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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 934

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, ET AL., APPELLANTS,

vs.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED APRIL 16, 1943.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil 2780

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, LEO OSHINSKI, and Enkay Packing Company, Inc. (Isie Schindel, Nathan Krupnick, Hugo Herbst, Isidore W. Feldman, and Seymour Feldman and Irving Sherman, Leo Schloss Inc., Metropolitan Beef Co. Inc., Gustave Sobo, Edwin Branigan, Edward Fishkin, Meyer Barnett, and Max Steinhardt '& Max Steinhardt, Inc. Riverview Packing Company Inc., Harry Theobald Jr., Saul Feld, Charles Feld, and Morris Feld, partners trading as Feld Brothers and Sidney Schweld and Sam Schweid, Albert Abeles, Max Tischler and Fred Horns) Intervening Plaintiffs, Plaintiffs,

vs.

CHARLES M. PHILLIPS, U. S. Attorney

DOCKET ENTRIES

1943.

March 8. Complaint filed.
March 8. Summons issued (2 copies).
March 9. Notice of motion for temporary restraining order filed.
March 10. Order designating Hon. Albert B. Maris, C. C. A. Judge Hon. Guy L. Fake and Hon. Thomas F. Meaney to hear case at Statutory hearing filed.
March 10. Summons returned served on Charles M. Phillips personally on March 9th filed.
March 10. Notice of motion for leave to intervene as party plaintiff filed (Leo Schloss Inc.).
March 11. Motion to dismiss filed.
March 11. Notice of application for interlocutory injunction restraining the enforcement of emergency price control Act of 1942, upon ground of Unconstitutionality filed.
March 11. Affidavit of Mailing filed.
March 11. Notice of motion of Kenneth Hansen for leave to intervene as party plaintiff filed.

DOCKET ENTRIES—Continued

March 11. Hearing on motion for temporary restraining order. Continued to be heard before Statutory Court on March 17th (Fake).

March 13. Notice of motion to intervene as party plaintiff filed (Isie Schindel).

[fol. 2]

March 13. Notice of motion to intervene as party plaintiff filed (Nathan Krupnick).

March 13. Affidavits of service of motion to dismiss filed (5).

March 15. Petition of Metropolitan Beef Co. Inc. and Albert Abeles and Max Tischler to intervene filed.

March 15. Notice of motion for leave to intervene filed (Met. Beef Co. et als.).

March 15. Notice of motion for leave to intervene as party plaintiff (Hugo Herbst).

March 15. Notice of motion to intervene as party plaintiff filed (Isidore W. Feldman and Seymour Feldman).

March 16. Petition of Clem Lockerty, et al. for preliminary injunction filed.

March 16. Motion for adjournment of Statutory court. (Adjourned to March 22 (Fake)).

March 16. Order adjourning statutory hearing filed (Mar. 22).

March 17. Hearing on motion to vacate or amend order of March 16, 1943 to include motion to dismiss. Denied without prejudice to renew motion to dismiss before Statutory court (Fake).

March 17. Order allowing intervention of Isie Schindel filed.

March 17. Order allowing intervention of Nathan Krupnick, filed.

March 17. Order allowing intervention of Hugo Herbst filed.

March 17. Order allowing intervention of Isidore W. Feldman and Seymour Feldman filed.

March 17. Notice of motion for leave to intervene as party plaintiff filed (Irving Sherman).

March 17. Affidavit of service of motion filed (I. Sherman).

DOCKET ENTRIES—Continued

March 17. Order permitting Irving Sherman to intervene filed.

March 19. Order permitting Leo Schloss Inc. to intervene as party plaintiff filed.

March 19. Notice of motion for order permitting plaintiffs to file amended or supplemental complaint filed.

March 19. Order adjourning statutory hearing filed (Mar. 26).

March 22. Order adjourning statutory hearing filed (Mar. 26).

March 22. Order permitting Metropolitan Beef Co. Inc. Albert Abeles and Max Tischler to intervene filed.

March 25. Notice of motion for leave to intervene as party plaintiff filed (Fred Horns).

March 26. Amended and Supplemental complaint filed.

March 26. Order permitting Fred Horns as party plaintiff filed.

[fol. 3]

March 26. Notice of motion for leave to intervene as party plaintiff filed (Gustave Sobo, Edwin Branigan).

March 26. Order permitting Gustave Sobo and Edwin Branigan to intervene as party plaintiff filed.

March 26. Notice of motion for leave to intervene as party plaintiff filed (Meyer Barnett and Edward Fishkin).

March 26. Order permitting Meyer Barnett and Edward Fishkin to intervene as party plaintiff, filed.

March 26. Notice of motion for leave to intervene as party plaintiffs filed (Max Steinhardt Inc. and Max Steinhardt).

March 26. Order permitting Max Steinhardt Inc. and Max Steinhardt to intervene as party plaintiffs filed.

March 26. Notice of motion for leave to intervene as party plaintiff filed (Irving Sherman).

March 26. Order permitting Irving Sherman to intervene as party plaintiff filed.

DOCKET ENTRIES—Continued

March 26. Statutory Hearing. See Minutes for several motions. Decision reserved (Maris, Fake and Meaney).
March 29. Opinion filed (Maris and Fake and Meaney).
April 2. Order granting motion to dismiss the amended and supplemental complaint filed.
April 2. Notice of motion to intervene as parties plaintiffs filed (Riverview Packing Co. Inc. and Harry Theobald, Jr.).
April 2. Notice of motion to intervene as parties plaintiffs filed (Feld Bros. Saul Feld, and Charles Feld and Morris Feld).
April 2. Notice of motion to intervene as parties plaintiffs filed (Sidney Schweid and Sam Schweid).
April 5. Hearing on motion to intervene as parties plaintiff re Riverview Packing Co. Inc. and Harry Theobald Jr. Feld Bros. Saul Feld Charles Feld and Morris Feld re Sidney Schweid and Sam Schweid. No opposition Court stated it thought it had no power to permit an order to be signed in that case is dismissed (Fake).
April 9. Petition for appeal filed (Supreme Court).
April 9. Assignment of Errors filed.
April 9. Citation issued.
April 9. Citation returned, service acknowledged April 9 filed.
April 9. Statement of Basis of Jurisdiction filed.
April 13. $200 Security for costs on appeal (Deposited in registry).
April 13. Certificate of Deposit of Security for costs filed.
[fol. 4]
April 13. Order permitting Riverview Packing Co. Inc., Harry Theobald, Jr. Saul Feld, Charles Feld and Morris Feld partners trading as Feld Brothers and Sidney Schweid and Sam Schweid to intervene as parties plaintiff filed.
April 13. Stipulation as to record on appeal filed.
April 13. Statement as to record on appeal filed.
April 13. Acknowledgment of service filed.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Filed March 9, 1943

To: Charles M. Phillips, United States Attorney for the District of New Jersey, Post Office Building, Newark, New Jersey.

SIR:

Please Take Notice, that on Thursday, March 11, 1943 at ten o'clock in the forenoon (E. W. Y.) before Honorable Guy L. Fake, Judge of the United States District Court for the District of New Jersey at the Post Office Building, Newark, New Jersey, plaintiffs will move the Court for a temporary restraining order in the above entitled cause enjoining the defendants his assistants, agents, deputies, representatives and each of them from prosecuting or attempting to prosecute the indictments returned on February 9, 1942, which are more particularly described in the complaint hereunto annexed, and from moving the argument upon the motions to quash and abate said indictments and from attempting to institute any other or further prosecutions against them or either of them under the Emergency Price Control Act of 1942 until plaintiffs' application for an interlocutory injunction as prayed in said complaint, be heard and determined by three judges in accordance with the provisions of Title 28 U. S. C. A. Section 380(a) upon the grounds as follows:

[fols. 6-9] 1. Unless restrained, the defendant will immediately require plaintiffs to argue their motions to quash and abate the aforementioned indictments and if said motion is denied, move said indictments for trial, although the Court may have no jurisdiction to afford plaintiffs a hearing thereon unless said Emergency Price Control Act is declared unconstitutional by said three Judge Court and thereby immediate and irreputable injury, loss and damage will result to plaintiffs, as more particularly set forth in the verified complaint filed herein;

2. If the defendant acts in the aforementioned manner, any judgment which this Court may later render on final determination of this cause will be ineffective.

Harold Simandl, Attorney for Plaintiffs, 24 Branford Place, Newark, N. J.

STATE OF NEW JERSEY,
County of Essex, ss:

Martin M. Kurtz, being duly sworn upon his oath deposes and says:

On March 9, 1943 at about 10:30 A. M. I served a true copy of the within Notice of motion for temporary restraining order upon Charles M. Phillips, U. S. Attorney for the District of New Jersey by handing same to Mr. Hughes, U. S. Assistant District Attorney, personally.

Martin M. Kurtz.

Sworn and subscribed to before me this 9th day of March, 1943. Albert Freeman, A Master in Chancery of N. J.

[fol. 10] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—March 11, 1943

The defendant, Charles M. Phillips, United States Attorney for the District of New Jersey, moves that this action be dismissed for the following reasons:

1. The complaint fails to state a claim against defendant upon which relief can be granted.

2. The complaint would require the Court to consider the validity of regulations issued by the Administrator of the Office of Price Administration pursuant to the provisions of Section 2 of the Emergency Price Control Act of 1942 (56 Stat. 23) and requests the Court to stay, restrain, enjoin and set aside in whole or in part the provisions of said Act and of said regulations, and to enjoin the enforcement of said Act and of said regulations; and pursuant to Section 204(d) of said Act, the Court is without jurisdiction of the subject matter of the complaint or to grant the relief prayed therein.

3. The complaint is without equity in that it appears therefrom that plaintiffs have, and each of them has, an adequate remedy at law under said Emergency Price Control Act.

4. The complaint is without equity in that it appears therefrom that plaintiffs have, and each of them has, failed to exhaust their administrative and judicial remedies under the Emergency Price Control Act.

5. The complaint is without equity in that it appears therefrom that plaintiffs have, and each of them has, an adequate remedy at law in the defense of the criminal proceedings referred to in the complaint.

6. The complaint is without equity in that it fails to state any facts justifying equitable relief.

Charles M. Phillips, United States Attorney.

[fols. 11-16] Affidavit of service omitted in printing.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed March 11, 1943

To Honorable Francis Biddle, The Attorney General of The United States, Washington, D. C.

HONORABLE SIR:

Please Take Notice, that on Wednesday March 17th, 1943 at 10 o'clock (E. W. T.) in the forenoon in the Post Office Building, Newark, New Jersey, before Honorable Albert B. Maris, Circuit Judge, the Honorable Guy L. Fake and Honorable Thomas F. *Meany*, District Judges, (who have been duly designated by the Senior Circuit Judge to participate in hearing and determining the application hereinafter mentioned) plaintiffs, will press the application for an interlocutory injunction as prayed for in the complaint, annexed hereto and made a part hereof,

And Take Further Notice that at the same time, the plaintiffs will apply to said Court for an order appointing a Master to take depositions of witnesses residing within and without the State to be used in support of said application.

Respectfully, Harold Simandl, Attorney for plaintiffs, 24 Branford Place, Newark, New Jersey.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED AND SUPPLEMENTAL COMPLAINT

1. Each of the above named plaintiffs is, and at all the times with respect to which he or it is hereinafter mentioned, was a citizen and resident of the State of New Jersey and within the judicial district of New Jersey. The defendant is the duly appointed, commissioned, qualified and acting United States District Attorney for the District of New Jersey and is, and at all the times with respect to which he is hereinafter mentioned, was a citizen and resident of said State.

2. This action arises under the Constitution of the United States, Article I, section 1; section 8, clause 18; section 10, clause 1; Article III, section 1; section 2, clause 3; the Fifth, Sixth and Eighth Amendments of the Constitution of the United States; the Emergency Price Control Act of 1942, as amended October 2, 1942, and Executive Order of the President of the United States No. 9250 issued on October 3, 1942, as hereinafter more fully appears.

3. The amount in controversy insofar as it refers to and affects each of the plaintiffs herein exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

4. Each of the plaintiffs has been for many years, and is now, engaged as a wholesale merchant in buying and selling, and in handling and in dealing in and with meats in the Northern part of the State of New Jersey. For the purposes of their respective businesses, each has and maintains a substantial structure wherein are contained a refrigerator and the necessary equipment for the storage, handling, de-

livery and distribution of his or its said merchandise. Each employs a substantial force of salesmen, meat handlers and cutters, drivers and other personnel necessary in the conduct of his or its aforementioned business. Each of the [fol. 19] said plaintiffs has so conducted his or its said business that he or it now has hundreds of customers and a well established trade, and has created and now owns in addition to his or its tangible property and assets aforesaid and his or its very great investment therein, a good-will of immense value and constituting one of his or its most important and valuable assets. No combination of any kind now exists or at any time existed between or among plaintiffs to fix or otherwise affect the selling price of any article of meat dealt in by any of them, and unrestricted competition has always existed and does now exist between and among them.

5. Plaintiffs are not slaughterers of cattle or live stock. They purchase dressed meat which has been "inspected and passed" under Federal Laws from those of the meat industry who purchase, slaughter and process live stock, known and hereinafter to be referred to as the "packers". After purchase, such dressed meat is transported to plaintiff's establishments where such meat is butchered into appropriate cuts to meet the requirements and demands of their customers. Plaintiffs sell and dispose of their merchandise to their respectice customers, who are, in the main, retail butchers maintaining small shops throughout the Northern part of the State of New Jersey. Said retail butchers dispose of their product to the ultimate consumer.

6. The packers ordinarily purchase the cattle for slaughtering purposes from cattle raisers, cattle feeders and others engaged in the business of scientifically breeding, raising, and generally preparing said cattle for marketing such animals for slaughtering purposes.

7. The price at which meat can be distributed by the wholesaler to the retailer, and by him in turn to the consumer, depends entirely upon the following factors:

(a) The market price paid by the packer for the live stock, in which must be included the cost of the agricultural commodities used in scientifically raising, breeding and feeding such live stock, as well as the expenses of main-

taining, handling and transporting same to the point where said live stock is purchased by the packers.

(b) The cost of the packer in acquiring and transporting same to his establishment, and the cost of killing, dressing, processing and distributing the dressed meat to the wholesaler.

(c) The cost of the wholesaler in acquiring, cutting, preparing, handling and delivering the dressed meat to the retailer.

(d) The cost of the retailer in finally selling the product to the ultimate consumer.

[fol. 20] In addition to these costs there must be included a reasonable and just profit to the cattle raiser or feeder, the packer, the wholesaler and retailer, if each of them is to remain in business and carry out the system of distribution necessary for the delivery of the processed meat in its final form to the ultimate consumer.

8. The supply of plaintiffs' meat products and of all others similarly situated is controlled and limited entirely by the number of cattle the packers conclude to slaughter. The number of cattle which the packers will undertake to slaughter, in turn, depends upon whether it is reasonably profitable for him to do so.

9. On January 30, 1942, there was enacted by the Congress of the United States, an act known as the "Emergency Price Control Act of 1942" (C. 26, 56 Stat. 23). Section 1a of said Act provides as follows:

"(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue im-

pairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and juris- [fol. 21] diction, to work toward a stabilization of prices, fair and equitable wages, and cost of production."

10. Under said Act there was created the Office of Price Administration, and the President did duly appoint a Price Administrator (hereinafter referred to as "Administrator"), for the purpose of operating said Office of Price Administration.

11. Section 2 a of said Act purported to authorize the said Administrator, whenever in his judgment the price or prices of a commodity has risen or threatened to rise to an extent or in a manner inconsistent with the purposes of said Act as hereinbefore set forth, by regulation or order, to establish such maximum price or prices as will in his judgment be generally fair and equitable and will effectuate said purpose.

12. Said Act further purported to authorize the Administrator, from time to time, to issue such regulations and orders in manner and form as in his judgment are necessary or proper in order to carry out and effectuate the purposes and provisions of said Act, to direct the making and keeping of records and other documents and reports, and to establish such other offices throughout the United States, and to appoint such assistants, agents and employees as he might deem advisable or necessary for the operation and enforcement of said Act.

13. Section 202 a of said Act further purported to authorize said administrator to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order, or in the administration and enforcement of said Act and regulations, orders, and price schedules promulgated thereunder.

14. Section 3 of said Act provides as follows:

"(a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

[fol. 22] (b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended,

or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

15. Section 205 (b) of said Act provides:

"Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

16. By Section 205 (c) of said Act, the Federal district courts are invested with jurisdiction of criminal proceedings brought for violations of Section 4 of said Act, and the rules and regulations promulgated thereunder.

[fol. 23] 17. Under and by virtue of the authority purported to be conferred by said Act there was established by said Administrator in the State of New Jersey, a branch office of said Office of Price Administration, and there was duly appointed such personnel as he deemed necessary to act in his behalf within the said State.

18. Thereafter, on or about April 28, 1942, the Administrator, assuming to act under the power allegedly delegated to him, promulgated the general maximum price regulation, under the terms of which he arbitrarily exempted and excepted from the operation thereof, certain commodities "for reasons of administrative impracticability resulting from lack of standardization of units, the fre-

quency and small size and character of the transactions involved, or some other factors. Examples of commodities excepted at all stages for administrative reasons include rare stamps, coins and books; antique furniture; live animals and the like. Other exceptions from the regulations are attributable to the fact that the commodities involved are subject to regulation at a subsequent stage of production or distribution where effective control may more feasibly be exercised. Such commodities include raw and unprocessed greenhouse or agricultural commodities."

19. Thereafter, on or about June 19, 1942, the Administrator assuming to act under the power allegedly delegated to him, promulgated a series of orders, regulations and price schedules, among which was Maximum Price Regulation No. 169, which purported to become effective by the terms thereof, on and after July 13, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulation.

20. On October 2, 1942, there was enacted by Congress, an amendment to the Emergency Price Control Act of 1942, which inter alia provides as follows:

"2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this act; and may exercise any power or authority conferred upon him by this act through such department, agency, or officer as he shall direct. The President may suspend the provisions of Section 3 (a) and 3 (c), and Clause (1) of Section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this act, but he may not under the authority of this act suspend any other law or part thereof.

3. No maximum price shall be established or maintained for any agricultural commodity under authority of this act [fol. 24] or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture:

(1) The parity price (such commodity adjusted by the Secretary of Agriculture for grade, location and seasonal

differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of Section 3(B) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use; and no maximum price shall be established or maintained under authority of this act or otherwise, for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in Clauses (1) and (2) of this section; Provided, that the President may, without regard to the limitation contained in Clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in Clause (1) of this section. Provided further, that modification shall be made in maximum prices established for any agricultural commodity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs. Provided further, that in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including live stock, a generally fair and equitable margin shall be allowed for such processing: Provided further, that in fixing price maxi-

[fol. 25] mums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this act, adequate weighting shall be given to farm labor."

21. Under and by virtue of said Act, as amended, there was issued by the President, Executive Order No. 9250, October 3, 1942, 7 F. R. 7871, which, inter alia, provides as follows:

Title IV:

"1. The prices of agricultural commodities and of commodities manufactured or processed in whole or substantial part from any agricultural commodity shall be stabilized, so far as practicable, on the basis of levels which existed on September 15, 1942, and in compliance with the act of October 2, 1942.

2. In establishing, maintaining or adjusting maximum prices for agricultural commodities or for commodities processed or manufactured in whole or in substantial part from any agricultural commodity, appropriate deductions shall be made from parity price or comparable price for payments made under the Soil Conservation and Domestic Allotment Act, as amended, parity payments made under the Agricultural Adjustment Act of 1938, as amended, and governmental subsidies.

3. Subject to the directives on policy of the director, the price of agricultural commodities shall be established or maintained or adjusted jointly by the Secretary of Agriculture and the Price Administrator; and any disagreement between them shall be resolved by the director. The price of any commodity manufactured or processed in whole or in substantial part from an agricultural commodity shall be established or maintained or adjusted by the Price Administrator, in the same administrative manner provided for under the Emergency Price Control Act of 1942.

4. The provisions of Sections 3 (a) and 3 (c) of the Emergency Price Control Act of 1942 are hereby suspended to the extent that such provisions are inconsistent with any or all prices established under this order for agricultural commodities, or commodities manufactured or processed in whole or in substantial part from an agricultural commodity.

Title V:

1. The Price Administrator in fixing, reducing, or increasing prices, shall determine price ceilings in such a manner that profits are prevented which in his judgment are unreasonable or exorbitant."

[fol. 26] 21a. Thereafter, again assuming to act under and by authority conferred by said Act, the Price Administrator promulgated Revised Maximum Price Regulation No. 169, which became effective by the terms thereof on December 16, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulations.

22. Notwithstanding the interrelationship between the price of live stock and the agricultural commodities used in breeding, raising and feeding said stock, as hereinbefore set forth, and the price at which the wholesaler and packer could sell the dressed meat, neither in Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 169, nor in any other regulation, at any time was there established by the Administrator any maximum price for the sale of such commodities and live stock by said Administrator.

22a. Under the setup of the meat industry as hereinbefore set forth which had been long and firmly established at the time of the adoption of said Act, there was such an interrelationship between the various stages in the operation of said industry, as hereinbefore set forth, that the inevitable result of the design and scheme of said Act would be such a rise in the prices of livestock and other agricultural commodities used in breeding, raising and feeding said livestock that the packer (who was and is an integral part of said system for the distribution of meat to the final consumer), would be unable to slaughter and process livestock without great loss, and therefore, would refuse to slaughter the same, bringing about a complete shutting off of the supply of meat to plaintiffs and others similarly situated, thereby forcing them out of business. Another inevitable result of the design and scheme of said Act would be to cause a complete shutting off of the supply of meat to the general public. What was thus contemplated and intended by said Act has, in fact, come to pass, and plaintiffs and others similarly situated are now on the verge

of being forced out of business and many others similarly situated have already been forced out of business. In addition, the supply of meat to the general public has been substantially stopped, making it virtually impossible for the general public to procure meat and thereby causing a clamor of the public for meat.

22b. Under the setup of the meat industry as it had been long and firmly established at the time of the adoption of said Act, as hereinbefore set forth, there was such an interrelationship between the various stages in the operation of said industry, as hereinabove set forth, that the application and construction of said Act by said Administrator caused such a rise in the price of the livestock and other [fol. 27] agricultural commodities used in breeding, raising and feeding said livestock that the packer (who was and is an integral factor in the distribution of meat to the final consumer) became unable to slaughter and process livestock without suffering great loss in his business and he therefore refused to slaughter the same, completely shutting off the supply of plaintiffs and others similarly situated for said meat, and forcing them out of business or putting them on the verge of being forced out of business. Another inevitable result of the Administrator's construction and application of said Act was to cause a substantial shutting off of the supply of meat to the general public, making it virtually impossible for many communities to procure meat.

23. On or about January 6, 1943, William Sherman Green, Jr., whose title is Chief Enforcement Attorney, Office of Price Administrator, Newark District Office, sent to several hundred retail meat dealers having shops in the Northern Part of the State of New Jersey, a communication (a photostatic copy of which is hereunto annexed, forms a part hereof, and is marked "Schedule A"). In said communication, said retail meat dealers were required to appear before the Chief Enforcement Attorney of the Office of Price Administration, Newark District Office, on the 8th day of January, 1943, at various hours "as a witness in regard to alleged violations of Maximum Price Regulations Nos. 169, 148 or 269." Said meat dealers were required to bring with them "all invoices, purchase slips, delivery tickets, books of account, checks and vouchers, together with all their records pertaining thereto, covering or referring to your purchases of beef, lamb, veal, pork and poultry

from October 1, 1942 to the date thereof." The appearance, text and format of said letter were such as to create the impression or belief to the addressee that such a letter was a mandate or a subpoena compelling him to comply with the terms thereof. Many of the customers of the plaintiffs and others similarly situated, were the recipients of said letter and hundreds of said recipients, in compliance with the mandate of said letter, went to the Office of the Price Administrator, where they were examined and exhibited their books, records and papers concerning purchases alleged to have been made by such recipients from plaintiffs and others similarly situated.

23a. At or about the same time, certain assistants of the Adminstrator appeared at the places of business of some of the plaintiffs herein and requested access to and custody of their books of account and other records pertaining to their purchases, sales and deliveries of meat and other commodities. Said investigators pursued their said investigation for many weeks and gained, through said investigation, the names and address of the customers of the plain-
[fol. 28] tiffs whom they were investigating. Said investigators have not as yet completed their said investigation.

24. One of the Administrator's Assistants, engaged in said investigation, appeared before a United States Commissioner, at Newark, and made criminal complaints against plaintiffs, and others similarly situated, charging alleged violations of the Emergency Price Control Act of 1942 and the regulations promulgated thereunder. Warrants were issued by the said United States Commissioner founded on said complaints and plaintiffs, and others similarly situated, were arrested and held to bail.

25. Thereafter, the defendant herein obtained leave of this Court to file criminal informations, each containing multiple Counts, charging the plaintiffs herein and others similarly situated with divers alleged violations of the Emergency Price Control Act of 1942 and the aforementioned Regulations 169 promulgated thereunder.

25a. Anthony Caruso, one of the plaintiffs herein, obtained a hearing on the complaint lodged against him before the said United States Commissioner, and at said hearing the Administrator's Assistant admitted that the testimony, upon which said complaint and criminal information

thereafter filed were based, was hearsay obtained from one of the plaintiffs' alleged customers who had been summoned to the office of the Administrator in manner aforesaid.

26. The aforementioned investigation of the Assistants of the Administrator continued. Several of the said investigators appeared before a Federal Grand Jury which was holding a session in this District and there sought and obtained the indictment of plaintiffs, and others similarly situated, for additional alleged violations of said Act and regulation.

27. After said indictment had been returned against plaintiffs and others similarly situated by said Federal Grand Jury, it was announced in the public press by those conducting said investigation that said investigation was not completed and that further indictments would be sough based upon information thus obtained.

28. The indictments were returned February 9, 1943, and each of said indictments contains multiple Counts ranging from five Counts to thirty Counts.

29. Each Count was based upon an alleged single sale of meat by each of the plaintiffs to one of his or its retail customers.

30. A typical Count contained in each of said indictment is as follows:

"1. At all times hereinafter mentioned in this indictment, Enkay Packing Company, Inc., was a Corporation of New [fol. 29] Jersey, and Nathan Krupnick was a resident of the County of Passaic, in the District aforesaid.

"2. That on or about the 2nd day of October, in the year 1942, at Paterson, in the County of Passaic and State and District of New Jersey and within the jurisdiction of this Court, Enkay Packing Company, Inc. Nathan Krupnick in violation of Section 4 (a) of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169, 'Beef and Veal Carcasses and Wholesale Cuts', as amended, did knowingly, wilfully and unlawfully sell and deliver to Central Beef Co., 82 Central Avenue, Passaic, New Jersey, a quantity of beef at a price in excess of the price permitted by said Regulation, to wit: 3,372 pounds of forequarters of

beef, of a grade to the Grand Jurors unknown, at the price per pound of 23½¢, and to a total amount of $792.42, the maximum price permitted by said Regulation for forequarters of beef of the Grade AA, being 22¢ per pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

31. In many of the indictments based upon said single sale an additional Count was contained therein charging a further and additional violation of said Emergency Price Control Act of 1942 and said regulations promulgated thereunder arising out of the alleged failure to "make and preserve a complete and accurate record of such sale".

32. A typical Count of such charges is as follows:

"1. And the Grand Jurors aforesaid, inquiring aforesaid, on their oaths aforesaid, do hereby reallege and incorporate as if herein set forth in full, the allegations contained in Paragraphs 1 and 2 of Count I of this indictment.

"2. That on or about the date aforesaid, at Paterson, in the County of Passaic and State and District of New Jersey, and within the jurisdiction of this Court, Enkay Packing Company, Inc. Nathan Krupnick in violation of Section 4 (a) of the Emergency Price Control Act of 1942, and Maximum Price Regulation No. 169, did knowingly, wilfully and unlawfully fail to make and preserve a complete and accurate record of such sale, showing the date thereof, the name and address of the buyer and seller, the quantity, grade and weight of the forequarters of beef so sold, and the [fol. 30] price charged and received therefor, and did knowingly, wilfully and unlawfully record such sale and delivery as a sale and delivery of 3,372 pounds of fowl, at the price per pound of 23½¢ and to a total amount of $792.42; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States".

33. Section 205 (b) of the Emergency Price Control Act of 1942 provides as follows:

"Any person who willfully violates any provision of section 4 of this Act and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or

section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000.00, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment".

34. Each sale made by plaintiffs and others similarly situated, may, under the provisions of said Act and the regulations promulgated thereunder, involve and constitute a separate offense. In the business of each of the plaintiffs, and others similarly situated, hundreds of such transactions took place daily. As a result, plaintiffs are, and each of them is, subjected to the possibility of prosecution for each and every of the many transactions in which they daily necessarily took part. Having learned of the identity and addresses of plaintiffs' customers, the Administrator's Assistants have kept the shops of such customers under complete surveillance and have trailed and followed plaintiffs' delivery trucks while they were engaged in making deliveries to such customers. After plaintiffs' employees, or some of them, removed the meat from their trucks and placed it in the customers' shops, the Administrator's Assistants have entered such shops and have proceeded to interrogate such customers with regard to deliveries and purchases of said meat. They have inquired into all of the details of each transaction, and have demanded and taken with them the records of each customer regarding said transactions and other transactions had with plaintiffs or some of them or with others similarly situated. Such Administrator's Assistants have then required said customers to appear at the Newark office of the Administrator, and there subjected them to further interrogation. Such harassment of the customers has caused many of them to cease doing business with the plaintiffs herein and others similarly situated. Some of the Administrator's Assistants have publicly declared that it was the policy and intention of the Administrator to drive plaintiffs and others similarly situated out of business. A Federal Grand Jury of this [fol. 31] Honorable Court is still convened and subject to the call of the Court. The defendant, through his duly authorized assistant, has publicly announced that he has secured from the Administrator and his Assistants, and now has in his possession, evidence of further and other transactions obtained during the abovementioned investi-

gation. The defendant, through his assistants, has declared that he intends to, and will, unless prevented by injunctive order of this Honorable Court, present to said Grand Jury such testimony against plaintiffs and others similarly situated for the purpose of securing further and additional indictments based upon the alleged violations by plaintiffs and others similarly situated of said Emergency Control Act and the regulations promulgated thereunder, and in each of said indictments, he intends to and will make many, if not all, of said transactions, the basis of numerous separate charges and counts. Defendant, through his duly authorized assistants, has threatened to and will, unless prevented by this Honorable Court, urge such prosecutions to final conclusion. Said defendant, through his duly authorized assistants, has further threatened that if additional testimony is supplied to him by the Administrator's Assistants, he will in each instance, continue to present such testimony to the Grand Jury, and if possible obtain other and further indictments against plaintiffs and others similarly situated, upon what he has asserted to be numerous and almost innumerable violations of said Acts and the regulations promulgated thereunder, and he has threatened to and, unless prevented by this Court, will, urge such further and additional prosecutions to final conclusion. *There will thereby inevitably ensue enormous multiplicity of criminal proceedings in addition to the informations and indictments abovementioned.* The plaintiffs and each of them are merely of average financial means and worth, possessing assets (including their structures, plants, equipment, good will, accounts receivable, and moneys on hand) of upwards of $25,000 above their just liabilities. If plaintiffs or any of them are convicted upon the trials of such indictments, they may or will be compelled to pay such heavy fines that their entire assets will be wiped out and they and each of them will be left penniless. In addition, in the cases of the individual plaintiffs, they may be compelled to suffer imprisonment. If the defendant is not enjoined by the injunctive order of this Court from taking the course which he has threatened, and has actually entered upon, against plaintiffs, the Grand Jury and the Courts will be flooded with repeated, prolonged and expensive litigations, and the Public Treasury subjected to great loss, all of which will be wholly unnecessary and improper if, as plaintiffs con-

tend, the act and the regulations herein involved be declared invalid.

35. All of said plaintiffs are in the same situation; all have at all times earnestly, honestly and conscientiously [fol. 32] endeavored to exact no unlawful or excessive prices for their merchandise and are continuing and will continue so to do. Notwithstanding this, all of them and all others similarly situated, are exposed to and will suffer from the like procedure on the part of the defendant. But in the nature of things, indictments cannot and will not be returned against all of them at the same time, nor will all of them be prosecuted collectively or simultaneously and indictments or a prosecution for violation of said Acts and regulations promulgated thereunder against one or several of said plaintiffs, however unjustified, and whatever the ultimate result of the trial thereunder, will inevitably inflict upon the one or the ones so attacked, great irreparable and immeasurable damage and injury, subject them to public odium, divert from them and to others in exactly the same situation, except that they have not yet been publicly attacked, business which they would otherwise enjoy and thereby greatly diminish, if not utterly destroy, the established business and good will which has been the result of years of honest and earnest effort and created by great expenditure of capital and energy, thereby great, irreparable and immeasurable damage and loss will be inflicted.

36. Plaintiffs have been advised by their counsel and allege that the aforementioned acts, information and indictments and the threatened prosecution by defendant of plaintiffs and others similarly situated, are and must be based upon the assertion and contention that the said Emergency Price Control Act of 1942 in so far as applies to plaintiffs or any of them is valid and effective. But said Act was at the times mentioned in said informations and indictments and now is wholly invalid, ineffective, null and void for the following reasons, to wit:

(a) As an attempted regulation of prices, charges or transactions, said Act, as to these plaintiffs, is wholly invalid and unconstitutional because such power of regulation is in any event a legislative power and pertains to and may be exercised by the legislative branch of the government alone. But in and by said Act the legislative de-

partment has not itself established or defined the basis of such regulation of prices, charges or transactions, but has attempted thereby to delegate to a wholly different department or departments, to wit, to the Administrator, the right and the power in each particular instance and by differing standards to so regulate, thereby violating the provisions of the Constitution of the United States and the amendments thereto, whereby the powers of Government are classified and assigned to the three great departments, to wit, legislative, executive and judicial, and each is prohibited from exerting or attempting to exert a power belonging to either of the others.

[fol. 33] (b) Said Act is wholly invalid and unconstitutional because the attempted classification made in such Act whereby the prices of agricultural commodities, including live stock, are either wholly exempt from the operation of said Act or are thereby given preferential treatment is unjust, unreasonable and arbitrary and deprives plaintiffs and each of them, as well as others similarly situated, of their property and rights without due process of law.

(c) Said Act is invalid and wholly unconstitutional because it is in conflict with the Fifth Amendment to the Constitution of the United States in that by said Act plaintiffs, and each of them, as well as others similarly situated, are deprived of their liberty and of their property without due process of law and their private property taken without just or any compensation.

(d) The business in which plaintiffs are engaged of buying, selling, handling and dealing in meat is not one of such public nature as to permit the regulation thereof by public authority of charges or prices employed, made or imposed in connection therewith. The Act of Congress herein involved constitutes an unreasonable interference with and deprivation of the right or liberty of contract and so deprives plaintiffs and each of them of their liberty and of their property without due or proper process of law.

(e) The said Act is wholly invalid and unconstitutional because it fails to set forth therein any certain or proper standard course or procedure or certain rules of decision to guide said Administrator in the performance of his duties and authority or functions in contravention of the Constitution of the United States and amendments thereto.

(f) Said Act is wholly invalid and unconstitutional because it contravenes the Fifth and Sixth Amendments to the Constitution of the United States in that it deprives them of their right to be informed of the nature and cause of the accusation and fails to define with requisite certainty what is forbidden and denounced.

37. Each of the plaintiffs interposed in answer to said indictments a motion to quash and abate same upon the grounds, inter alia, that said indictments did not charge an offense against the public laws of the United States, because the aforementioned Act and the regulations promulgated thereunder upon which they were based were unconstitutional, invalid and void. Plaintiffs prayed that the Court afford them an opportunity to be heard on said motion to quash.

37a. Plaintiffs are advised by their counsel and allege that because the unconstitutionality of said Act and the regulations promulgated thereunder are not in some re-
[fol. 34] spects patent, but must be established by competent evidence which can be produced, the trial court may decline to pause in said trial upon said indictments to receive such evidence and plaintiffs thereby will be unable adequately and properly to present such issue to the trial court for its determination.

38. Defendant herein threatens to and, unless prevented by injunctive order of this court, will move the trial of said indictments before said Court at an early date and will insist that the District Court vested with the power to try defendants upon said indictments is, by virtue of Sections 204 (c) and (d) of the Emergency Price Control Act of 1942, hereinafter set forth, without jurisdiction, power or authority to pass upon the legal sufficiency of the charges made in each of said indictments or to hear and determine the aforesaid motions made by plaintiffs attacking the validity of said indictment.

39. Section 204 (d) of the Emergency Price Control Act of 1942 created a Court of the United States to be known as the "Emergency Court of Appeals".

40. Section 204 (d) of the said Act provided:

"The Emergency Court of Appeals and the Supreme Court, upon review of judgments and orders of the Emer-

gency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order or price schedule. Except as provided in this section, no Court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provisions."

41. Section 204(c) further provides:

"The Court (Emergency Court of Appeals) shall have the powers of a District Court with respect to the jurisdiction conferred on it by this Act; except that the Court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under Section 2 on any price schedule effective in accordance with the provisions of Section 206."

[fol. 35] 42. The defendant will also urge and insist at the trial of the aforementioned indictments before the District Court vested with the right to try plaintiffs upon said indictment that said Court is by virtue of Sections 204 (c) and (d) of the aforementioned Act without jurisdiction, authority or power to inquire into the authority of the Administrator to promulgate the aforementioned regulations and to determine or decide whether said regulations were within the power alleged to have been conferred upon the Administrator by virtue of the said Act.

43. The plaintiffs have been advised by their Counsel and allege that Sections 204 (c) and (d) of said Statute are wholly unconstitutional, void, invalid and ineffective for the following reasons, among others:

(a) Said portions of said Statute are in conflict and repugnant to the provisions of Article III, Section 1 and Section 2, Clause 3, in that said provisions deprive the District Court vested with jurisdiction to try the plaintiffs on

said indictments from affording to them a full, fair, complete and impartial trial on all the issues involved therein within the State and District wherein said alleged crime was committed and deprives said Court of the power to determine its own jurisdiction over the subject matter of said issues.

(b) Said portions of said Act are repugnant to Amendment Five of the Constitution of the United States in that they deprive and deny to the plaintiffs herein the right to defend themselves by establishing that the Grand Jury has failed to return an indictment against them, charging a violation of a public law of the United States.

(c) Said portions of said Act are repugnant to Amendment Six of the Constitution of the United States in that they deprive and deny to the plaintiffs herein the right to a public trial in a criminal prosecution in the State and District wherein the crime is alleged to have been committed upon all of the issues embraced within said indictment and the offenses charged therein.

44. Unless this Court declares Sections 204 (c) and (d) invalid and unconstitutional, insofar as they affect the plaintiffs herein, as hereinabove stated, the trial Court may require them to proceed with the trial upon said indictments and its action in refusing to hear and pass upon the validity of said indictments and the issue presented by the motions to quash and abate cannot be reviewed on appeal, except on appeal from a possible judgment of conviction rendered after a long and expensive trial of said indictments. If the injunction sought by this action shall be granted or if this Court declares said acts unconstitutional and grants the other prayers and relief requested herein, a necessarily long [fol. 36] and protracted trial of the indictment will become unnecessary and much time of a trial judge, the United States Attorney, the Government's witnesses, the plaintiffs, their attorney and their witnesses and great expense to both Government and the plaintiffs would be saved. This action or application for an injunction must, pursuant to the Act of August 24, 1937, Chapter 754 (U. S. C. A. Title 28, Section 380 (a)) be heard and determined by three Judges from whose decision an appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof as provided by law.

44a. Plaintiffs have not nor has any of them voluntarily or knowingly waived their right to challenge the constitutionality of said Act or the regulations of the Administrator promulgated thereunder.

44b. Plaintiffs have been advised by their counsel and allege that the Administrator has no right, power, authority or jurisdiction to pass upon or judicially decide and determine any of the issues presented by plaintiff's attack on the constitutionality of the Emergency Price Control Act of 1942 or of the regulations promulgated thereunder.

45. By reason of the facts, hereinabove set forth, plaintiffs have no plain, speedy or adequate or any remedy whatsoever at law. They are wholly without remedy, save and except in equity here sought. Unless this bill is entertained and the relief here sought granted, plaintiffs, and each of them, will be and inevitably must be subjected to great, irreparable and immeasurable loss and damage for which they would have and could have no remedy whatever.

46. The questions involved herein and presented hereby are of common and general interest, not only to all of the plaintiffs named herein, but also to all other merchants and wholesale dealers in meats similarly situated.

This suit, therefore, is brought not only in behalf of the plaintiffs here named, but also in behalf of all others so similarly situated who may hereafter come in and be made parties plaintiff hereto, participate in the prosecution of this suit, and join in the expenses thereof.

Wherefore, the plaintiffs pray:

1. That a summons issue out of this Court directed to the defendant, requiring and commanding him to appear in this Court and in this action upon a day certain and answer the allegations of this complaint;

2. That the Court declare and decree the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and particularly Sections 204 (c) and (d) thereof wholly unconstitutional, invalid, null and void and of no effect as against the plaintiffs and each of them and all others similarly situated;

[fol. 37] 3. That there be issued herein a preliminary or interlocutory injunction, to remain in effect until the final

hearing of this cause, prohibiting the defendant, his assistants, deputies, agents and representatives, and each of them, from enforcing or attempting to enforce against the plaintiffs herein, or either or any of them, or against the officers, agents or representatives of them or either of them, said Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, from prosecuting or attempting to prosecute the aforesaid indictments returned on February 9, 1942, more particularly described in this complaint, and from prosecuting or attempting to prosecute or instituting or attempting to institute any other or further prosecution or prosecutions against them or either of them under said Act and from in any manner interfering with them or either of them or with the business of them or either of them, or taking or attempting to take any steps whatsoever in respect to them or either of them or the businesses of them or either of them, under or by-virtue of any right or authority claimed to exist by reason of the said Act as amended or any part thereof; and that upon final hearing said injunction may be made permanent;

4. That the matter set forth herein be heard and determined by this Court and upon a date to be made by the Court, and that the Court provide a hearing by three judges, one of whom shall be a Circuit Judge, as provided by law, after due notice thereof; and

5. For such other, further and different relief as to the Court may seem meet and just in the premises and for costs in this behalf expended.

Harold Simandl, Attorney for Plaintiffs, 24 Branford Place, Newark, New Jersey.

Arthur T. Vanderbilt, Joseph A. Feder, Abram I. Bluestein, Barney Larkey, Harry Schaffer, Morris H. Cohn, Of Counsel.

[fol. 38] UNITED STATES OF AMERICA,
State of New Jersey,
District of New Jersey, ss.:

ANTHONY CARUSO, being duly sworn, on his oath, deposes and says:

1. I am one of the plaintiffs named in the aforementioned action. I have read the foregoing complaint and the facts contained therein are true.

2. I am a citizen and resident of the State of New Jersey and within the judicial district of New Jersey and I believe that the other plaintiffs named in this action are likewise citizens and residents of the State of New Jersey and within the judicial district of New Jersey. I also know that the Enkay Packing Company, Inc. is a corporation duly organized under the Laws of the State of New Jersey and has its principal place of business within the State and District of New Jersey.

3. The defendant, Charles M. Phillips, is the duly appointed and acting United States District Attorney for the District of New Jersey.

4. The amount in controversy in so far as it refers to and affects each of the plaintiffs herein, exceeds, exclusive of interests and costs, the sum of $3,000.00 as more fully appears from the allegations of the complaint.

5. I personally know Clem Lockerty, Edward A. Carroll and Leo Oshinski and Enkay Packing Company, Inc., who are also named as plaintiffs herein, for many years. Like myself, they are now and have been for many years in the past engaged as wholesale meat dealers buying and selling and handling meats in the northern part of the State of New Jersey. All of us each maintain a substantial plant containing the necessary equipment for the storage, handling and delivery of meat. All of us employ salesmen, meat handlers, cutters and drivers and other personnel who are required in the conduct of said business. We compete with one another and no combination of any kind has ever existed between us for fixing or otherwise affecting the selling price of meat.

6. We are not slaughterers of cattle, but purchase dressed government inspected meat from those known in the industry as "packers". We transport the meat, which we purchase, to our place of business where our employees cut it to meet the requirements and demands of our customers. We sell to retail butchers who maintain shops throughout the northern part of New Jersey. Our customers dispose of their products to the ultimate consumer.

[fol. 39] 7. As the result of my business experience, I am familiar with the meat industry and I state that the manner in which such industry is carried on is set forth in

paragraphs 6, 7, and 8 of the complaint. Under said set up of the meat industry which had been long and firmly established at the time of the adoption of the Emergency Price Control Act, there was such an inter-relationship between the various stages in the operation of said industry that the inevitable result of the design and scheme of said Act would be such a rise in the prices of livestock and other agricultural commodities used in breeding, raising and feeding said livestock, that the packer (who was and is an integral part of said system for the distribution of said meat to the final consumer) would be unable to slaughter and process livestock without great loss, and therefore, would refuse to slaughter the same, bringing about a complete shutting off of the supply of meat to us and others similarly situated, forcing us out of business. Another inevitable result of the design and scheme of said Act would be to cause a complete shutting off of the supply of meat to the general public. What the Act contemplated has come to pass since it has been in operation, and we and others similarly situated are now on the verge of being forced out of business, and many others similarly situated have already been forced out of business. In addition, the supply of meat to the general public has been substantially stopped, making it virtually impossible for the general public to procure meat, thereby causing a clamor of the public for meat.

8. On or about January 6, 1943, many of my customers exhibited to me a communication, which they had received, similar to the photostatic copy which is annexed to the complaint and marked "Schedule A".

9. Shortly thereafter said customers informed me that they had appeared at the Newark District Office of the Price Administrator and had undergone an examination by certain representatives of the office and had presented to them their records, books of accounts and other data pertaining to their purchases and sales of meat.

10. Shortly thereafter I was informed by the United States Marshal that I was required to appear before the United States Commissioner at Newark to answer to a criminal complaint charging me with violations of the Emergency Price Control Act of 1942 and the regulations promulgated thereunder. At that time I met other of the plaintiffs, who were similarly charged with such violations before said United States Commissioner. Subsequently, I

was advised that a criminal information had been filed against me in the United States District Court of New Jersey based upon the charges contained in said complaint. At a subsequent hearing before the Commission on said [fol. 40] complaint, Mr. Diamond of the office of the Administrator stated that the complaint and the criminal information are based on information obtained in a conversation with one of my customers who had appeared at the Administrator's office in response to the notice above mentioned.

11. When I appeared in the United States District Court to answer to the said criminal information I found that the other plaintiffs and other wholesale dealers were similarly charged in informations with like violations.

12. Thereafter on February 9, 1943, indictments were returned against me, the other plaintiffs and others similarly situated. Each of said indictments contained multiple Counts ranging from five to thirty counts.

13. Each Count of said indictments was based upon an alleged single sale by each of the plaintiffs and the other wholesale dealers to one of our or their retail customers.

14. A typical Count in each of said indictments is set forth in paragraph No. 30 of the complaint.

15. Some of the indictments based upon said single sale contained an additional Count, specifying an alleged further and additional violation of the Emergency Control Act of 1942 and the regulations promulgated thereunder, arising out of the alleged failure of said plaintiffs to "make and preserve a complete and accurate record of said sale".

16. A typical Count on such charge is set forth in Paragraph 32 of the complaint.

17. During the time aforesaid and thereafter, there have appeared in the press announcements by those having charge of enforcement of the aforementioned Act for the Office of Price Administration that said investigation was incomplete, had merely scratched the surface and required studies and that further indictments would be sought based upon the information still to be examined and presented.

18. I have at all times earnestly and honestly endeavored to exact no unlawful or excessive prices for my merchandise and am continuing and will continue so to do.

19. In the normal course of our businesses, we make hundreds of sales of meat each day. As a result, we, and each of us are subjected to the possibility of prosecution for each and every one of the many transactions in which we daily necessarily took part. Because of the indictments which have been found against me and the other plaintiffs, we, and each of us, have been subjected to public odium, and many of those who have heretofore dealt with [fol. 41] me have, without justification, refused to further deal with me. We have lost many of our customers because they have been subjected to harassment by those in charge of the enforcement of the aforementioned Act for the Office of Price Administration. After our employees have delivered meat to customers, investigators of the Price Administrator have entered our customers' shops and have subjected the customers to interrogation and required them to produce their records of purchases and sales of meat. Some of said customers have been required to appear at the Newark Office of the Price Administrator, where they were subjected to further interrogation. Some of the Administrator's assistants have declared that it was the policy and intention of the Administrator to drive us and others similarly situated out of business. We have since learned that additional information has been supplied by those having charge of enforcement of the Act for the Price Administrator to the defendant. A Federal Grand Jury for the District of New Jersey is still convened and subject to the call of the Court, and the defendant, through his assistant, has declared that he intends to present to said Grand Jury the additional aforementioned information supplied to him, as aforesaid, with the purpose of obtaining further and additional indictments against us and others similarly situated. In each of said indictments he intends to and will make many, if not all, of said transactions in which we are daily engaged the basis of numerous separate charges and counts, and the defendant, through his duly authorized assistants, has threatened to and will urge such prosecution to final conclusion. The defendant, through his duly authorized assistants, has further stated that if additional information is supplied to him by the

Administrator's assistants, he will, in each instance, continue to present such information to the Grand Jury, and, if possible, obtain other and further indictments against us and others similarly situated upon what defendant asserts to be numerous and almost innumerable violations of said Acts and the regulations promulgated thereunder. The other plaintiffs and I are of average financial means and worth, each of us possessing assets (including our structures, plants, equipment, good will, accounts receivable, and money on hand) of upwards of $25,000 above our just liabilities. If we, or any of us, are convicted upon the trials of such indictments, we may be or will be compelled to pay such heavy fines that our assets will be wiped out and we and each of us will be left penniless. In addition, such of the plaintiffs as are individuals may be compelled to suffer imprisonment.

20. In my behalf a motion to quash and abate the indictment against me was filed and I asked for a hearing upon said motion. I have been advised that the defendant intends to move the trial of said indictment at an early date. [fol. 42] I have been advised by my Counsel that the District Court at the insistence of the defendant may deny me an opportunity to be heard upon my motion addressed to said indictment for the reasons set forth in paragraphs 37a, 38, 39, 40, 41 and 42 of the complaint.

21. I have further been advised that unless this Court declares Sections 204 (c) and (d) of the Emergency Price Control Act of 1942 unconstitutional I may be required to proceed with the trial upon the indictment and will not be able to have the validity of said indictment decided by the Court at my trial and that I would for the reasons set forth in Paragraph 44 of the complaint have no adequate remedy, except through the intervention of this Court.

22. I have not, nor have any of plaintiffs, voluntarily or knowingly waived my or their right to challenge the constitutionality of said Act or the regulations of the Administrator promulgated thereunder.

.....

ANTHONY CARUSO.

Sworn and subscribed to before me
this day of March, 1943.

[fol. 43] UNITED STATES OF AMERICA,
State of New Jersey,
District of New Jersey, ss:

Nathan Krupnick, being duly sworn, on his oath, deposes and says:

That he is President of the Enkay Packing Company, Inc., a New Jersey corporation, one of the plaintiffs abovenamed; that such plaintiff is a corporation and for that reason he makes this verification in its behalf; that the facts stated in the foregoing complaint are within his knowledge and therefore he makes this verification on behalf of all the plaintiffs; that he has read the foregoing complaint and knows the contents thereof and the facts therein stated are true to the best of his knowledge and belief.

Nathan Krupnick.

Subscribed and sworn to before me this — of March, 1943. —— ——.

UNITED STATES OF AMERICA,
State of New Jersey,
District of New Jersey, ss:

Clem Lockerty, being duly sworn, on his oath, deposes and says:

That he is one of the plaintiffs above named; that he has read the foregoing complaint and knows the contents thereof and the facts therein stated are true to the best of his knowledge and belief.

Clem Lockerty.

Sworn and subscribed to before me this — day of March, 1943. —— ——.

[fol. 44] UNITED STATES OF AMERICA,
State of New Jersey,
District of New Jersey, ss:

Edward A. Carroll and Leo Oshinski being duly sworn upon their respective oaths depose and say:

That they are plaintiffs in the above matter; that they have read the foregoing complaint and know the contents

thereof and the facts therein stated are true to the best of their knowledge and belief.

Edward A. Carroll. Leo Oshinski.

Sworn and subscribed to before me this — day of March, 1943. —— ——.

———

SCHEDULE A

Form No. N. J. L. 54.

Office of Price Administration

20 Washington Place

Newark, New Jersey

To:

You are hereby requested to appear before the Chief Enforcement Attorney of the Office of Price Administration, Newark District Office, 20 Washington Place, City of Newark, on the 8th day of January, 1943, at the hour of 1:15 P. M., as a witness in regard to alleged violations of Maximum Price Regulations #169, #148 or #269. You are also requested to bring with you all invoices, purchase slips, delivery tickets, books of account, checks and vouchers, together with all other records pertaining thereto, covering or referring to your purchases of beef, lamb, veal, pork and poultry from October 1, 1942 to date.

Dated, January 6th, 1943.

Wm. Sherman Greene, Jr., Chief Enforcement Attorney, Office of Price Administration, Newark District Office, 20 Washington Place, Newark, N. J.

———

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION SUR MOTION TO DISMISS

Before Maris, Circuit Judge, and Fake and Meaney, District Judges

MARIS, Circuit Judge:

The plaintiffs' amended and supplemental complaint seeks to have the defendant as United States Attorney for

the District of New Jersey enjoined from enforcing the Emergency Price Control Act of 1942 against the plaintiffs and in particular from prosecuting indictments returned and threatened to be returned against them thereunder. Since an injunction is sought to restrain the enforcement of an act of Congress a court of three judges has been constituted to hear the case under section 3 of the Act of August 24, 1937, 28 U. S. C. A. § 380a. The defendant moves to dismiss the complaint upon the ground, inter alia, that section 204 (d) of the Emergency Price Control Act expressly deprives this court of jurisdiction to grant the injunctive relief sought. The portion of that section relied upon by the defendant is as follows:

[fol. 46] "The Emergency Court of Appeals and the Supreme Court, upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order or price schedule. Except as provided in this section, no Court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations, or orders, or making effective any such price schedule, or any provision of any such regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision."

It will be seen that the act expressly provides that no court, Federal, State or Territorial, except the Emergency Court of Appeals and the Supreme Court to the extent of their jurisdiction under the act, "shall have jurisdiction or power * * * to * * * enjoin * * * any provision of this act authorizing the issuance of such regulations or orders * * * or any provision of any such regulation, order * * * or to * * * enjoin the enforcement of any such provision." We think it is clear that this statutory provision, if valid, effectively withdraws from the district courts all jurisdiction and power to issue an injunction under the circumstances disclosed in the complaint before us. The plaintiffs urge, however, that the provisions of section 204 (d) are unconstitutional. Their con-

tention is that the section deprives all courts of the power to consider the constitutionality of the act and the section, therefore, deprives litigants of the right to raise that issue in any court. We think that this contention is without merit.

[fol. 47] The portion of section 204 (d) which we are considering deprives the courts of the country, other than the Emergency Court of Appeals, merely of jurisdiction and power to "stay, restrain, enjoin or set aside * * *" These words refer to the type of affirmative relief sought to be obtained from a court, the type being injunctive in its nature; they do not indicate or imply that a court may not consider the constitutionality of the act if that question arises incidentally in a criminal prosecution or civil suit. For example, we think it is clear that in a criminal prosecution or in a civil suit brought by the Price Administrator for an injunction to restrain a violation of the act or of a regulation issued thereunder section 204 (d) does not deprive the court of power to consider a defense based upon the alleged constitutionality of the act. When Congress desired to prohibit courts from considering the question of validity under any circumstances it knew how to do so by the use of appropriate language for in the very sentence which we are considering it deprives all courts except the Emergency Court of Appeals of power "to consider the validity of any such regulation, order or price schedule" but it does not here or elsewhere in terms prohibit the courts from considering the validity of the act itself.

The plaintiffs do not deny that the words, "stay, restrain and enjoin" refer to injunctive relief but they argue that the phrase "set aside" has a broaded meaning and that when Congress said that no court might "set aside" any provision of the act it meant that no court might declare it unconstitutional. We do not agree that the phrase was intended to have any such broad meaning as this. It is [fol. 48] a rule of statutory construction that language, if ambiguous, is to be construed, if possible, so as to make the enactment valid and effective. United States v. Powers, 307 U. S. 214 (1939). We think that the phrase "set aside" was intended to refer to cases in which affirmative relief against the statute is sought. An analogous procedure is that of appeal in which an appellate court may by its judgment set aside the judgment or order of the court or administrative agency under review. Whether any court

has jurisdiction to set aside an act of Congress in this sense we need not consider. For it is clear that Congress intended to make certain that no court would assume to exercise any such jurisdiction with respect to the Emergency Price Control Act.

We conclude that by section 204 (d) Congress has withdrawn from this court the jurisdiction and power to grant the injunction prayed for. That Congress had power thus to limit the jurisdiction of an inferior court of the United States is settled. Kline v. Burke Constr. Co., 260 U. S. 226 (1922); Lauf v. E. G. Shinner & Co., 303 U. S. 323 (1938). See also Smallwood v. Gallardo, 275 U. S. 56 (1927).

The complaint will be dismissed for want of jurisdiction.

[fol. 49] FAKE, District Judge, dissenting:

The majority opinion results in a final judgment dismissing the complaint. I find myself unable to concur in the reasoning thereof or in the result arrived at.

It appears on the face of the complaint that each of the plaintiffs is engaged in the business of buying and selling meats at wholesale in the northern part of the State of New Jersey. They complain that the enforcement of the Emergency Control Act of 1942, as amended, injuriously effects them in the operation of their respective businesses and has resulted in indictments being returned against them for alleged violations thereof. They assert that sections 204 (c) and (d) of the aforesaid Act leaves the District Court in which they are indicted without jurisdiction to pass upon the legal sufficiency of the charges contained in the indictments, and this they contend results in a deprivation of their respective constitutional rights. They seek equitable relief by way of a preliminary injunction out of this court to stay the United States Attorney from proceeding with the trials under the indictments until the final hearing of this cause.

The motion to dismiss is based, among other things, upon the assertion that to grant the relief sought this court must violate the express limitations placed upon its jurisdiction by virtue of Section 204 (d) of the Emergency Control Act.

The pertinent sentences of Section 204 (d) read as follows:

[fol. 50] "The Emergency Court of Appeals and the Supreme Court, upon review of judgments and orders of

the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order or price schedule. Except as provided in this section, no Court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule or to stay, restrain, enjoin or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision."

It is clear that the first sentence above quoted intends to lodge exclusive jurisdiction in the Emergency Court of Appeals in the first instance to pass upon the "validity" of the regulations or orders issued under Section 2, which is the price control section, with jurisdiction to review vested in the United States Supreme Court. What does the word "validity" mean in this connection? Does it limit the consideration of a regulation or order to matters and things found wholly within the confines of the Emergency Act itself or does it also permit the two courts to consider validity from the angle of constitutionality? In my view there can be but one answer to this question: "Validity" as here contemplated must be arrived at not only within the four corners of the Act wherein evidence bearing upon arbitrary and capricious conduct may be considered but also it may be arrived at after a consideration of the pertinent constitutional provisions upon which the Act itself in the last analysis must find its justification. [fol. 51] It follows that the word "validity" in the sentence when coupled with the language conferring exclusive jurisdiction on the two courts, evidences an intent to prohibit the United States District Court for the District of New Jersey from exercising any authority to pass upon the constitutionality of the Emergency Act as it may arise at the trials under the indictments. In considering the second sentence of the Act above quoted, it is again equally clear that the letter and the spirit indicate an unmistakable intent to deprive the District Court of the right to "set aside" for unconstitutionality any provision of the Act

upon which the regulations or orders may be based. The words "set aside" must be given their usual and generally accepted effect and as used in this statute they preclude the setting aside of the Act for any and all reasons whatsoever. Section 380a of Title 28, pursuant to which this court is now sitting, uses the words "setting aside" in the same sense that a setting aside is what occurs to an Act of Congress when it is found to be "repugnant to the Constitution of the United States". So in the instant case if the Act were found to be unconstitutional it would be "set aside" and for nothing holden.

Considering both sentences together I can arrive at no other conclusion but that it was the studied intent and manifest desire of Congress to prohibit the District Courts of the United States, the Circuit Courts of Appeals and as well this three-judge Statutory Court, from exercising their usual powers to pass upon the constitutionality of the Emergency Control Act or of anything that might be attempted by way of rules or orders under the guise thereof. Moreover such construction involving as it does a total elimination of the injunctive powers of the courts is quite [fol. 52] in line with the modern tendency of Congress partially to strip the courts of their injunctive powers when the objects sought might be interrupted or invalidated by the exercise of equitable relief. This leaves the plaintiffs herein stripped of their constitutional rights in the only forum where they may be tried on the indictments pending against them. It deprives them of due process of law guaranteed by the Fifth Amendment and also invade their right to a full and complete trial in the state where the alleged crimes were committed as guaranteed by Article 3, Sec. 2, Clause 3 of the Constitution.

Since the plaintiffs herein must face indictments wherein issues are involved bearing on the words above considered their meaning should be positive and certain and no strained interpretation should be indulged to save the constitutionality of any part of the Act.

It is my thought that a temporary stay should issue and that we should proceed to final hearing on the complaint.

[fol. 53] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Civil Action. File No. 2780

CLEM LOCKERTY, et als., Plaintiffs,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey, Defendant

ORDER DISMISSING COMPLAINT—Filed April 2, 1943

The plaintiffs having filed their complaint and amended and supplemental complaint herein; the defendant having filed a motion to dismiss the amended and supplemental complaint and the plaintiffs having filed a motion herein for an interlocutory injunction; and the motions of the defendant and the plaintiffs having been regularly brought on before the Honorable Albert B. Maris, United States Circuit Judge, Guy L. Fake and Thomas F. Meaney, United States District Judges, the Court designated and convened as directed by the statute, sitting at Newark, New Jersey on March 26, 1943, and plaintiffs having appeared by Arthur T. Vanderbilt Esquire, of Counsel, and Harold Simandl, Esquire, attorney for the plaintiffs, and the defendant appearing pro se and by Robert L. Wright, Special Assistant to the Attorney General, and arguments having been heard; and the Court having filed its opinion sur motion to dismiss on March 29, 1943, a certified copy of which is annexed hereto and made a part hereof;

It is on this 2nd day of April, 1943, on motion of Charles M. Phillips United States Attorney, the defendant herein, for the reasons stated in the annexed copy of the opinion sur motion to dismiss, filed March 29, 1943.

[fol. 54] Ordered and Adjudged that the motion of defendant to dismiss the amended and supplemental complaint be granted and the amended and supplemental complaint is hereby dismissed for want of jurisdiction.

For the Court.

Thomas F. Meaney, United States District Judge.

The foregoing order is approved as to form only.

Arthur T. Vanderbilt, of Counsel with plaintiffs.

An exception is prayed and allowed to plaintiffs.

For the Court.

Thomas F. Meaney, Judge.

[fol. 55] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Considering themselves aggrieved by the final order and judgment of the United States District Court for the District of New Jersey, made and entered in the above entitled cause on the second day of April, 1943, dismissing the amended and supplemental complaint herein, the plaintiffs therein appeal from said judgment to the Supreme Court of the United States.

The said final order is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable.

Wherefore, in order that your petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray for the allowance of an appeal in said cause to the Supreme Court of the United States, agreeably to the statutes and rules of the Court in such case made and provided, and that a proper order touching the security required of the petitioners may be made.

Dated: April 9th, 1943.

Harold Simandl, Attorney for Petitioners Clem Lockerty, Anthony Caruso, Edward A. Carroll, Leo Oshinski and Enkay Packing Company, Inc.
Arthur T. Vanderbilt, of Counsel with Petitioners.

[fol. 56] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The said Clem Lockerty, Anthony Caruso, Edward A. Carroll, Leo Oshinski and Enkay Packing Company, Inc., assign the following errors in the record and proceedings in the said cause:

1. The District Court erred in dismissing the amended and supplemental complaint herein.

2. The District Court erred in ordering and adjudging that the motion of the defendant to dismiss the amended

and supplemental complaint should be granted and in dismissing the amended and supplemental complaint herein for want of jurisdiction.

3. The District Court erred in ruling that Section 204(d) of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23, 50 U. S. C. App. 924 (d)) has withdrawn from said Court Jurisdiction and power to grant the relief prayed for in the amended and supplemental complaint herein.

[fol. 57] 4. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying plaintiffs an injunction prohibiting the defendant from enforcing or attempting to enforce against the plaintiffs herein, or either or any of them, the provisions of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. Sec. 901, *et seq.*), as amended by the Act of October 2, 1942 (C. 578, 56 Stat. —; 50 U. S. C. App. Secs. 961, *et seq.*).

5. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying plaintiffs an injunction prohibiting the defendant from prosecuting or attempting to prosecute the indictments returned on February 9, 1943 against the plaintiffs herein.

6. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying plaintiffs an injunction prohibiting the defendant from prosecuting or attempting to prosecute, or instituting or attempting to institute any other or further prosecution or prosecutions against the plaintiffs or either of them under said Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942.

7. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying plaintiffs an injunction prohibiting the defendant from in any manner interfering with plaintiffs or either of them or with the business of plaintiffs or either of them under or by virtue of any right or authority claimed to exist by reason of the said Emergency Price Control Act of 1942 as amended, or any part thereof.

[fol. 58] 8. The District Court erred in dismissing the amended and supplemental complaint and in refusing to

adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it purports to improperly delegate the legislative power to the Price Administrator in violation of Article I, Section 1, of the Constitution of the United States.

9. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it is in conflict with the Fifth Amendment to the Constitution of the United States in that the attempted classification made in said Act is unjust, unreasonable and arbitrary, and deprives plaintiffs and each of them as well as others similarly situated of their liberty and their property without due process of law and deprives them of their private property without just compensation.

10. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it contravenes the Fifth and Sixth Amendments to the Constitution of the United States in that it deprives plaintiffs of their right to be informed of the nature and cause of the accusations made against them and fails to define with requisite certainty what is forbidden and denounced.

11. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge [fol. 59] that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of Section 1 and Section 2, Clause 3 of Article III of the Constitution of the United States, in that said section deprives plaintiffs of a full, fair, complete and impartial trial on all the issues involved in the indictments returned against plaintiffs on February 9, 1942, within the State and District wherein said alleged crimes were committed.

12. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Fifth Amendment to the Constitution of the United States in that

it deprives and denies to the plaintiffs herein the right to defend themselves by establishing that the grand jury has failed to return an indictment against them charging a violation of the public law of the United States.

13. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Sixth Amendment to the Constitution of the United States in that it deprives and denies to the plaintiffs herein the right to a public trial in a criminal prosecution in the State and District wherein the crime is alleged to have been committed [fol. 60] upon all of the issues embraced within said indictments and the offenses charged therein.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said judgment of the United States District Court for the District of New Jersey entered on the 2nd day of April, 1943, in the above entitled cause, be reversed, and for such other lawful relief as may be just and equitable in the premises.

Dated: April 9th, 1943.

Harold Simandl, Attorney of Plaintiffs-Petitioners.
Arthur T. Vanderbilt, of Counsel with Plaintiffs-Petitioners.

[fols. 61-78] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—April 9, 1943

The plaintiffs in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the District Court of the United States for the District of New Jersey on the second day of April, 1943, and having presented and filed their petition of appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is *Ordered* that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the District Court of the United States for the District of New Jersey in the above entitled cause, as provided by law; and it is further Ordered that the Clerk of the District Court of the United States for the District of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within ten days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of ——.

Dated April 9th, 1943.

Thomas F. Meaney, U. S. A. J.

[fols. 79-80] Citation in usual form showing service on Charles Phillips, omitted in printing.

[fols. 81-82] Certificate of Deposit of Security for Costs omitted in printing.

[fol. 83] In the Supreme Court of the United States

Clem Lockerty, Anthony Caruso, Edward A. Carroll, Leo Oshinski and Enkay Packing Company, Inc., Plaintiffs-Appellants,

vs.

Charles M. Phillips, United States Attorney for the District of New Jersey, Defendant-Appellee

On Appeal to the Supreme Court of the United States

Stipulation as to Record—Filed April 13, 1943

It is hereby stipulated by and between the plaintiffs, by their counsel, and the defendant that the Clerk of the United States District Court for the District of New Jersey prepare a transcript on appeal herein, including the following portions of the record, to wit:

1. Docket entries.
2. Notice of motion for temporary restraining order (filed March 9, 1943).
3. Order designating Statutory Court (Filed March 10/43).

4. Defendant's motion to Dismiss.
5. Notice of application for Interlocutory Injunction restraining the enforcement of the Emergency Price Control Act of 1942 (filed March 11, 1943).
6. Amended and supplemental complaint.
7. Opinion of Statutory Court.
8. Order dismissing Amended and Supplemental Complaint, exclusive of the opinion attached thereto.
9. Petition for Appeal to the Supreme Court of the United States.
10. Assignment of Errors.
11. State of basis of jurisdiction.
12. Order allowing appeal.
13. Citation.
14. Proof of Service.
15. Statement referring to Rule 12, paragraph 3.
16. Certificate of deposit of Security for costs.

Charles M. Phillips, Counsel for defendant-appellee, U. S. Attorney. Arthur T. Vanderbilt, Counsel for Plaintiffs.

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] IN THE SUPREME COURT OF THE UNITED STATES

No. 934

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed April 21, 1943

Come now the appellants and adopt their assignments of error as their statement of points to be ruled upon and represent that the whole of the record, as filed, is necessary for the consideration of the case.

Dated April 17, 1943.

Arthur T. Vanderbilt, Counsel for Appellants.

[fol. 86] SUPREME COURT OF THE UNITED STATES

No. 934, October Term, 1942

ORDER NOTING PROBABLE JURISDICTION—April 19, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted, and the case is advanced and assigned for argument on Monday, May 3, next.

Endorsed on Cover: Enter Arthur T. Vanderbilt. File No. 47,435. D. C. U. S., New Jersey, Term No. 934. Clem Lockerty, Anthony Caruso, Edward A. Carroll, et al., Appellants, vs. Charles M. Phillips, United States Attorney for the District of New Jersey. Filed April 16, 1943. Term No. 934 O. T. 1942.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 934

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, ET AL.,

Appellants,

vs.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

HAROLD SIMANDL,
ARTHUR T. VANDERBILT,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 934

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, LEO OSHINSKI AND ENKAY PACKING COMPANY, INC.,

Plaintiffs,

vs.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY,

Defendant.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the three-judge district court entered in this cause on April 2, 1943. The application for

appeal was filed on April 9th, 1943, and is presented herewith, to wit, on the ninth day of April, 1943.

Jurisdiction.

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of August 24, 1937, 50 Stat. 754, 28 U. S. C. App. 380 (a). See *California Water Service Co.* v. *City of Redding*, 304 U. S. 252; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Oklahoma, ex Rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508.

Statutes Involved.

Sections 2 (a) and (c), Section 3, Section 4 (a), Section 202 (b), Section 204 and Section 205 (b) of the Act of January 30, 1942; 56 Stat. 23, 50 U. S. C. App. 901, *et seq.*, commonly known as the Emergency Price Control Act of 1942, and Sections 2 and 3 of the Act of October 2, 1942, C. 578, 56 Stat. —, 50 U. S. C. App. 961, *et seq.*, commonly known as the Inflation Control Act of 1942, the pertinent provisions of which are as follows:

Provisions of the Emergency Price Control Act of 1942.

Section 2.

"(a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity,

there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time,

at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

"(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

Section 3.

"(a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade,

location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect

to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

Section 4.

"(a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 202.

"(b) The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer

oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

Section 204.

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceedings: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The

Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof, and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree

staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The Court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule,

or any provision of any such regulation, order, or price schedule, or "to restrain or enjoin the enforcement of any such provision."

Section 205.

"(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Provisions of the Inflation Control Act of 1942.

Section 2.

"The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."

Section 3.

"No maximum price shall be established or maintained for any agricultural commodity under authority of this Act or otherwise below a price which will reflect

to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control "Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted By the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further*, that modifications shall be made in maximum prices established for any agricultural commodity and for commodities processed or

manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further,* That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further,* That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural co[illegible]odity, as provided for by this Act, adequate weig[illegible]g shall be given to farm labor."

The Issues and the Ruling Below.

The complaint in this case was filed on March 8, 1943 and the amended and supplemental complaint was filed on March 26, 1943 by leave granted in open Court at the hearing before the three-judge District Court.

Summary of the Amended and Supplemental Complaint

The plaintiffs are citizens and residents of the State of New Jersey. The amount in controversy as it affects each, exceeds, exclusive of interest and costs, the sum of $3,000.

Each of the plaintiffs has been for many years and now is engaged as a wholesale merchant in buying and selling and dealing in meats in the northern part of the State of New Jersey. In connection with their business, each maintains a substantial structure containing the necessary equipment for the handling and distribution of meat. Each has so conducted his business that he has hundreds of customers, a well established trade, and has created a goodwill of great value.

The value of the assets of each of the plaintiffs is upwards of $25,000 above his just liabilities. They are not slaughterers of cattle or livestock, but purchase dressed meat which has been inspected and passed under Federal Laws from those of the meat industry who purchase, slaughter and process livestock, known and referred to as packers. After purchasing the dressed meat, plaintiffs butcher it into appropriate cuts to meet the demands and requirements of their trade and they sell and dispose of the meat to their customers who are, in the main, retail butchers maintaining small shops throughout the northern part of New Jersey. The packers ordinarily purchase the cattle for slaughtering purposes from cattle raisers, feeders and others engaged in the business of scientifically breeding, raising and preparing cattle and marketing them for slaughtering purposes. The price at which meat can be distributed by the wholesaler to the retailer and by him in turn to the consumer, depends entirely upon the following factors:

(a) The market price paid by the packer for the livestock in which must be included the cost of the agricultural commodities used in scientifically raising, breeding and feeding such livestock; also the expense of maintaining, handling and transporting the same to the point where the livestock is purchased by the packers.

(b) The cost to the packer in acquiring and transporting the same to his establishment and the cost of curing, dressing, processing and distributing the dressed meat to the wholesaler.

(c) The cost to the wholesaler in acquiring, cutting, preparing, handling and delivering the dressed meat to the retailer.

(d) The cost to the retailer in finally selling the product to the ultimate consumer.

It is further alleged that the supply of plaintiffs' meat products and of all others similarly situated is controlled

and limited entirely by the number of cattle that packers conclude to slaughter. The number of cattle which the packers will undertake to slaughter in turn depends on whether it is reasonably profitable for them to do so. The enactment by Congress of the Emergency Price Control Act of 1942 and of the Inflation Control Act of 1942 is set forth and it is alleged that, purporting to act under the authority of those Acts, the Price Administrator promulgated Maximum Price Regulation No. 169 [1] and Revised Maximum Price Regulation No. 169 [2] wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in the regulations.

It is further alleged that because of Section 3 of the Emergency Price Control Act and because of Section 3 of the Inflation Control Act, no maximum price was established by the Administrator for agricultural commodities or livestock, notwithstanding the interrelation between the price of livestock and the agricultural commodities used in breeding, raising and feeding said livestock. It is then alleged that under the setup of the meat industry as it had been long and firmly established at the time of the adoption of said Acts, there was such an interrelation between the various stages in the operation of the industry, that the inevitable result of the design and scheme of said Acts would be such a rise in the price of livestock and other agricultural commodities used in breeding, raising and feeding said livestock, that the packer would be unable to slaughter and process livestock without great loss and would therefore refuse to slaughter the same, bringing about a complete shutting off of the supply of meat to plaintiffs, thereby forcing them out of business and causing a complete shutting off of the supply of meat to the general public. What was thus contemplated and intended by the Acts in fact came to

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[1] Maximum Price Regulation No. 169 appears at 7 F. R. 4653.

[2] Revised Maximum Price Regulation No. 169, OPA 1267.

pass, as the result of the Administrator's construction and application thereof, and the plaintiffs and others similarly situated are on the verge of being forced out of business, many others have been forced out of business and in addition, the supply of meat to the general public has been substantially stopped. It is further alleged that on February 9, 1943, the grand jury returned indictments against these plaintiffs and others, all of which indictments are in substantially the same form, and contain multiple counts ranging from five to thirty counts. Each count was based on an alleged single sale of beef at a price in excess of the price permitted by the regulations in violation of Section 4 (a) of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169. In addition, there was in many of the indictments a single additional count charging that the plaintiffs had failed to make and preserve a complete and accurate record of such sale in violation of Section 4 (a) of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169.

It is further alleged that in the business of each of the plaintiffs hundreds of sales took place daily as the result of which each of them is subject to the possibility of prosecution with respect to each and every one of the many transactions in which they daily necessarily take part. It is alleged that the defendant, through his assistants, has declared that he intends to and will, unless prevented by injunctive order of the Court, present further testimony to the grand jury for the purpose of securing further and additional indictments based upon alleged violations of the Emergency Price Control Act and of the regulations promulgated thereunder. There will therefore inevitably ensue enormous multiplicity of criminal proceedings and if any of the plaintiffs are convicted, they may be compelled to pay such heavy fines that their entire assets may be wiped out. In addition, they may be compelled to suffer

imprisonment. The indictments and threatened prosecution of plaintiffs and others similarly situated are and must be based upon the validity of the Emergency Price Control Act of 1942, and it is alleged that said Act is wholly invalid and unconstitutional as being in conflict with Article I, Section 1, and Section 1 and Section 2, Clause 3 of Article III of the Constitution of the United States, and is in conflict with the Fifth and Sixth Amendments to the Constitution of the United States. It is then alleged that unless the defendant is restrained by injunctive order of the Court from prosecuting or attempting to prosecute and from obtaining or attempting to obtain further indictments against these plaintiffs and others similarly situated, they will suffer great and irreparable loss for which they would have and could have no remedy whatsoever.

The relief prayed for by the plaintiffs is that the Court declare and decree the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, including Sections 204 (c) and (d) of the Emergency Price Control Act, unconstitutional and invalid and that there be issued an injunction prohibiting the defendant from enforcing or attempting to enforce against the plaintiffs said Emergency Price Control Act of 1942 as amended and from prosecuting or attempting to prosecute the indictments returned on February 9, 1943, and from attempting to institute any other or further prosecutions against them and from in any manner interfering with them or with their business under or by virtue of any right or authority claimed to exist by reason of the said Act as amended, or any part thereof.

Proceedings Subsequent to Filing of Complaint.

Upon the filing of the complaint, application was made to District Judge Guy L. Fake for a temporary restraining order. Judge Fake immediately requested the Senior Cir-

cuit Judge of the Third Circuit to designate two other Judges to participate in hearing and determining such application.

On March 10, 1943, pursuant to the statute (50 Stat. 752) an order was entered designating Circuit Judge Albert B. Maris and District Judges Guy L. Fake and Thomas F. Meaney to hear the case on statutory hearing. On March 11, 1943, on notice to defendant, application was made to the District Judge for a temporary restraining order. The defendant agreed not to prosecute the indictments until after the hearing before the three-judge court and the District Judge thereupon ordered that the application for the temporary restraining order be continued to be heard before the three-judge court at the same time set for the hearing of defendant's motion to dismiss the complaint filed that day.

On March 26, 1943, defendant's motion to dismiss and plaintiffs' motion for an interlocutory injunction were brought on for hearing before the three-judge district court, due notice of the hearing having been given to the Attorney General of the United States, who was represented at the hearing by Robert L. Wright, Special Assistant to the Attorney General. On March 29, 1943, the Court filed its opinion, Judge Fake dissenting, holding that Section 204(d) of the Act is constitutional and that said Section has withdrawn from the Court the jurisdiction and power to grant the relief prayed for and ordering that the complaint be dismissed for want of jurisdiction.

On April 2, 1943, an order was filed and judgment entered thereon, dismissing the amended and supplemental complaint.

The Questions Are Substantial.

The Supreme Court has not yet had occasion to rule on the validity of the price control provisions, or any other

provisions of the Emergency Price Control Act of 1942, or of the Inflation Control Act of 1942.

There is a conflict of decisions in the lower federal courts as to the validity of the rent control provisions of the Emergency Price Control Act which provisions are similar to the price control provisions. In *Henderson* v. *Kimmel*, 47 F. Supp. 635, the three-judge court for the District of Kansas sustained the validity of the rent control provisions. In *Roach* v. *Johnson*, D. C. N. D. Ind. (Feb. 25, 1943), the District Court for the Northern District of Indiana held the rent control provisions unconstitutional. A direct appeal was taken from that decision to the United States Supreme Court by the intervenor, United States of America, and on Monday, April 5, 1943, the Supreme Court announced it would postpone until the oral argument decision on the question of jurisdiction.

The following decisions of the Supreme Court appear to sustain the plaintiffs' contention that the substantive provisions of the Act are unconstitutional: *Field* v. *Clark*, 143 U. S. 649; *Wichita* v. *Public Utility Co.*, 260 U. S. 48; *J. W. Hampton, Jr., & Co.* v. *U. S.*, 276 U. S. 394; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter* v. *U. S.*, 295 U. S. 495, and *U. S.* v. *Butler*, 297 U. S. 1.

The following decisions of the Supreme Court appear to sustain the plaintiffs' contention that Section 204(d), being an integral part of the Act, is invalid because of the invalidity of the substantive provisions of the Act: *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Hill* v. *Wallace*, 259 U. S. 44; *Champlain Refining Co.* v. *Corporation*, 286 U. S. 210; *Williams* v. *Standard Oil*, 278 U. S. 235.

If Section 204(d) is divisible or separable from the remainder of the Act, the following decisions of the Supreme Court appear to sustain planitiffs' contention that the Section is unconstitutional: *Pac. Tel. & Tel. Co.* v. *Kuykendahl*, 265 U. S. 196; *Michaelson* v. *U. S.*, 266 U. S. 42; *An-*

niston Mfg. Co. v. *Davis*, 301 U. S. 337; *Meyers* v. *Bethlehem Shipbuilding Co.*, 303 U. S. 41.

The following decisions of the Supreme Court appear to sustain plaintiffs' contention that the District Court should have retained jurisdiction of the complaint: *Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, 255 U. S. 98; *Borden's Farm Prod. Co.* v. *Baldwin*, 293 U. S. 194; *Panama Refining Co.* v. *Ryan*, 293 U. S. 288, and *Gibbs* v. *Buck*, 307 U. S. 76.

Respectfully submitted,

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ARTHUR T. VANDERBILT,
Of Counsel with Plaintiffs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,

Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLANTS.

HAROLD SIMANDL,
Attorney for Appellants;

ARTHUR T. VANDERBILT,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,
Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,
Appellee.

On Appeal from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANTS.

1.

The Opinions of the Court Below.

The opinions of the three-judge statutory court are unreported. The majority opinion appears in the record at page 37 and the dissenting opinion appears in the record at page 40.

2.

Statement of Jurisdiction.

The judgment of the statutory three-judge District Court to be reviewed was entered on April 2, 1943 (R. 4). Application for the allowance of an appeal was filed and presented on April 9, 1943 (R. 4). The order allowing appeal was dated and filed April 9, 1943. The jurisdiction of this court is invoked under 50 Stat. 754, 28 U. S. C. App. 380(a).

Statutes Involved.

The relevant portions of the Emergency Price Control Act of 1942 and the Inflation Control Act of 1942 are set out in the appendix.

Statement of the Facts.

The question presented for determination by this appeal is whether the statutory three-judge district court erred in holding that Section 204(d) of the Emergency Price Control Act of 1942 withdrew from the district court the jurisdiction and power to grant the relief prayed for in the complaint herein and in dismissing the complaint for want of jurisdiction.

On March 8, 1943, appellants filed the complaint on their own behalf as well as on behalf of all those similarly situated and twenty-five others have intervened in the action (R. 2-5). On March 26, 1943, by leave granted in open court at the hearing before the statutory three-judge district court, the amended and supplemental complaint was filed (R. 3). By stipulation of counsel, only the amended and supplemental complaint has been printed, so for brevity it will be referred to herein as the complaint.

Analysis of the Complaint.[1]

Appellants are citizens and residents of the State of New Jersey, and the amount in controversy as it affects each of them exceeds, exclusive of interest and costs, the sum of $3,000.00, and the action arises under the Constitution of the United States, Article I, Section 1; Section 8, Clause 18; Section 10, Clause 1; Article III, Section 1; Section 2, Clause 3; the Fifth, Sixth and Eighth Amend-

[1] The Amended and Supplemental Complaint is set forth in full at pages 9 to 37 of the Record.

ments to the Constitution of the United States; the Emergency Price Control Act of 1942 as amended and Executive Order No. 9250 issued October 3, 1942.

Appellants are and have been for a great many years engaged as wholesale merchants in buying and selling meats in the northern part of the State of New Jersey. In connection with his business, each maintains a substantial structure containing the necessary equipment for the handling and distribution of meat and each employs a substantial force of salesmen, meat handlers, drivers and other personnel necessary in the conduct of his business. Each is worth upwards of $25,000.00, has hundreds of customers, a well established trade and has created and owns in addition to his tangible property and assets, goodwill of great value, constituting one of his most important assets.

Appellants are not slaughterers of cattle or livestock but purchase dressed meat which has been inspected and passed under federal laws from packers who in turn purchase the cattle for slaughtering purposes from cattle raisers, feeders and others engaged in the business of scientifically breeding, raising and preparing cattle and marketing them for slaughtering purposes.

The price at which meat can be distributed by the wholesaler to the retailer and by him in turn to the consumer, depends entirely upon the following factors:

(a) The market price paid by the packer for the livestock, in which must be included the cost of the agricultural commodities used in scientifically raising, breeding and feeding such livestock, as well as the expenses of maintaining, handling and transporting same to the point where said livestock is purchased by the packers.

(b) The cost of the packer in acquiring and transporting same to his establishment, and the cost

of killing, dressing, processing and distributing the dressed meat to the wholesaler.

(c) The cost of the wholesaler in acquiring, cutting, preparing, handling and delivering the dressed meat to the retailer.

(d) The cost of the retailer in finally selling the produce to the ultimate consumer.

The supply of appellants' meat products and of all others similarly situated is controlled and limited entirely by the number of cattle the packers conclude to slaughter. The number of cattle which the packers will undertake to slaughter in turn depends on whether it is reasonably profitable for them to do so.

On or about April 28, 1943, the Administrator, assuming to act under the power allegedly delegated to him by the Emergency Price Control Act,[1] promulgated the General Maximum Price Regulation, under the terms of which he arbitrarily exempted and excepted from the operation thereof certain commodities "for reasons of administrative impracticability resulting from lack of standardization of units, the frequency and small size and character of the transactions involved, or some other factors. Examples of commodities excepted at all stages for administrative reasons include rare stamps, coins and books; antique furniture; live animals and the like. Other exceptions from the regulations are attributable to the fact that the commodities involved are subject to regulation at a subsequent stage of production or distribution where effective control may more feasibly be exercised. Such commodities include raw and unprocessed greenhouse or agricultural commodities."

[1] The Emergency Price Control Act of 1942; The Inflation Control Act of 1942 and the Executive Order of October 3, 1942 are set out in the Appendix.

On or about June 19, 1942, the Administrator, still assuming to act under the power allegedly delegated to him, promulgated Maximum Price Regulation No. 196, which purported to become effective on and after July 13, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulation. Thereafter the Administrator, assuming to act under the authority of the Act, as amended and Executive Order No. 9250 promulgated Revised Maximum Price Regulation No. 169 effective December 16, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulation.

Notwithstanding the inter-relationship between the price of livestock and the agricultural commodities used in breeding, raising and feeding said stock and the prices at which the wholesaler and packer could sell the dressed meat, neither in Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 169, nor in any other price regulation at any time, was there established by the Administrator any maximum price for the sale of such commodities and livestock. Under the set-up of the meat industry, there is such an inter-relation between the various stages in the operation of said industry that the inevitable result of the design and scheme of said Act would be such a rise in the prices of livestock and other agricultural commodities used in breeding, raising and feeding said livestock, that the packer would be unable to slaughter and process livestock without great loss and therefore would refuse to slaughter the same, bringing about a complete shutting off of the supply of meat to appellants and others similarly situated, thereby forcing them out of business. Another inevitable result of the design and scheme of said Act would be to cause a complete shutting off of the supply of meat

to the general public. What was thus contemplated and intended by the Act has in fact come to pass and appellants and others similarly situated have been on the verge of being forced out of business and many others similarly situated have been already forced out of business. In addition, the supply of meat to the general public has been substantially stopped, making it virtually impossible for the general public to procure meat.

The Administrator's assistants, in conducting their investigation trailed the trucks of the appellants and required hundreds of appellants' customers to come to the Newark office and bring with them various records. As a result of the publicity attendant upon the investigation, appellants lost many of their customers.

Thereafter, criminal informations were filed against appellants containing multiple counts and appellants were subsequently indicted. The indictments contained multiple counts, each count being based upon an alleged single sale of meat. Other counts in some of the indictments charge that appellants failed to make and preserve accurate records of sales of meat.

In the business of each of the appellants, hundreds of sales similar to those referred to in the indictments take place daily. Each sale made by appellants and others similarly situated may, under the provisions of Section 205(b) of the Act and the regulations promulgated thereunder, involve and constitute a separate offense and as a result, appellants are subject to the possibility of prosecution for each and every one of the many transactions in which they daily necessarily take part.

The Administrator's assistants have publicly declared that it was the intention of the Administrator to drive appellants and others similarly situated out of business. In

addition, appellee has stated that he will not only press for an early trial of the present indictments, but will seek other and further indictments against appellants and others similarly situated.

The indictments and the threatened prosecution by appellee of appellants must be based upon the assertion and contention that the said Emergency Price Control Act of 1942, insofar as it applies to appellants, is valid and effective.

Appellants have filed motions to quash and abate the indictments found against them upon the grounds, *inter alia*, that they did not charge an offense against the public laws of the United States because the Emergency Price Control Act and the regulations promulgated thereunder, upon which the indictments are based, are unconstitutional, invalid and void. Because the unconstitutionality o the Act and the regulations promulgated thereunder a e not in some respects patent, but must be established b competent evidence which can be produced, the trial court may decline to pause in the trial upon the indictments to receive such evidence and appellants thereby will be unable adequately and properly to present such issue to the trial court for its determination.

Appellants have earnestly and honestly endeavored to exact no unlawful or excessive prices for their merchandise, and by reason of the facts set forth, appellants have no adequate remedy in the courts of law. Unless the relief sought is granted, they will be inevitably subjected to irreparable loss and damage for which they would and could have no remedy whatsoever.

Proceedings on the Complaint.

Upon the filing of the complaint application was made to the District Judge for a temporary restraining order and he immediately requested the Senior Circuit Judge to designate two other judges to participate in hearing and determining such application.

On March 10, 1943, an order was duly entered designating three judges to hear the case and on March 11, 1943, on notice to appellee, application was made to the District Judge for a temporary restraining order until the hearing by the full court. The appellee agreed not to prosecute the indictments until after a hearing before the full court and the District Judge thereupon ordered that the application for the temporary restraining order be continued to be heard before the full court at the same time set for the hearing on appellee's motion to dismiss the complaint which was filed that day (R. 2).

The hearing on appellee's motion to dismiss and appellants' motion for an interlocutory injunction was held on March 26, 1943. On March 29, 1943, the court filed its opinion, one judge dissenting, holding that Section 204(d) is constitutional and that it withdrew from the court the jurisdiction and power to grant the relief prayed for and ordering that the complaint be dismissed for want of jurisdiction.

Specification of Errors.

1. The District Court erred in dismissing the amended and supplemental complaint herein.

2. The District Court erred in ordering and adjudging that the motion of the defendant to dismiss the amended and supplemental complaint should be granted and in dis-

missing the amended and supplemental complaint herein for want of jurisdiction.

3. The District Court erred in ruling that Section 204(d) of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23, 50 U. S. C. App. 924(d)) has withdrawn from said court jurisdiction and power to grant the relief prayed for in the amended and supplemental complaint herein.

4. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying appellants an injunction prohibiting the appellee from enforcing or attempting to enforce against the appellants herein, or either or any of them, the provisions of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. Sec. 901, *et seq.*), as amended by the Act of October 2, 1942 (C. 578, 56 Stat. .....; 50 U. S. C. App. Secs. 961, *et seq.*).

5. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it purports to improperly delegate the legislative power to the Price Administrator in violation of Article I, Section 1, of the Constitution of the United States.

6. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it is in conflict with the Fifth Amendment to the Constitution of the United States in that the attempted classification made in said Act is unjust, unreasonable and arbitrary, and deprives appellants and each of them as well as others similarly situated of their liberty and their property without due process of law and deprives them of their private property without just compensation.

7. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of Section 1 and Section 2, Clause 3 of Article III of the Constitution of the United States, in that said section deprives appellants of a full, fair, complete and impartial trial on all the issues involved in the indictments returned against appellants on February 9, 1942, within the State and District wherein said alleged crimes were committed.

8. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Fifth Amendment to the Constitution of the United States in that it deprives and denies to the appellants herein the right to defend themselves by establishing that the grand jury has failed to return an indictment against them charging a violation of the public law of the United States.

9. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Sixth Amendment to the Constitution of the United States in that it deprives and denies to the appellants herein the right to a public trial in a criminal prosecution in the State and District wherein the crime is alleged to have been committed upon all of the issues embraced within said indictments and the offenses charged therein.

SUMMARY OF ARGUMENT.

INTRODUCTORY STATEMENT. The complaint herein sets forth a cause of action cognizable in equity. The power of a federal court of equity to grant relief from the enforcement of an unconstitutional statute is well established where the circumstances of the case demonstrate, as they do here, that the appellants will suffer irreparable loss and damage unless enforcement of the Act is stayed pending judicial review as to its constitutional validity.

POINT I. The lower court erred in holding that section 204(d) of the Emergency Price Control Act of 1942 withdrew from the court jurisdiction and power to entertain the complaint and grant the relief prayed for and in dismissing the complaint for want of jurisdiction.

A. Section 204(d) as construed and applied by the District Court is invalid because it infringes upon the judicial power vested exclusively in the Judicial Department of the Government by Article III, Section 1, of the Constitution of the United States.

B. Section 204(d) as construed and applied by the District Court denies appellants the right to an injunction pending judicial review of the Emergency Price Control Act of 1942, thus depriving appellants of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

C. Section 204(d) deprives appellants of their right at the trial of the indictments found against them to raise as a defense the invalidity of the regulations issued by the Price Administrator, thus depriving appellants of their

property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and denies to appellants a full, fair, complete and impartial trial on all the issues involved on the indictments returned against them within the State and District wherein the alleged crimes were committed, in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and in violation of the Sixth Amendment to the Constitution of the United States.

D. Section 204(d), being an integral part of the Act, is invalid because of the invalidity of the substantive provisions of the Act.

POINT II. The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator in violation of Article I, Section 1, of the Constitution.

POINT III. The Emergency Price Control Act makes an unconstitutional, discriminatory classification in fixing prices on agricultural commodities and commodities processed or manufactured from any agricultural commodity.

ARGUMENT.

Introductory Statement.

There can be no doubt that a federal district court has the inherent constitutional power to enjoin the enforcement of an alleged unconstitutional act pending a judicial determination of its validity. *Ex parte Young*, 209 U. S. 123 (1908); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912); *Terrace* v.

Thompson, 263 U. S. 197 (1923); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Gibbs* v. *Buck*, 307 U. S. 66 (1939); *Beal* v. *Missouri*, 312 U. S. 45 (1941); *Porter* v. *Investor's Syndicate*, 286 U. S. 461 (1932); *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210 (1908); *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923); *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104 (1939); *Davis* v. *Wakelee*, 156 U. S. 680 (1895); *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937); *Liggett Co.* v. *Baldrige*, 278 U. S. 105 (1928); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Watson* v. *Buck*, 313 U. S. 387 (1941); *Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, 255 U. S. 98 (1921); *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935); *State of Oklahoma* v. *Guy F. Atkinson Co.*, 37 F. Supp. 93 (D. C. E. D. Okla., 1941); aff'd 313 U. S. 508 (1941); *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 F. 321 (C. C. A. 8, 1911).

It is also equally clear, as will be demonstrated under Point I (A) and (B) herein, that this inherent constitutional power of the federal equity courts cannot be taken away or infringed upon by the legislative or executive branches of the federal government. That judicial power, vested exclusively in the judicial department by the Constitution, is as free from encroachment by the legislative and executive branches of the government as are the legislative and executive powers respectively vested in the Congress and the President free from encroachment by the judicial department.

The complaint herein sets forth a valid cause of action under an historic head of equity jurisdiction. Grounds exist for a court of equity to restrain the enforcement of an alleged unconstitutional statute when it appears from the complaint: (a) that the jurisdictional requirements of the

amount in controversy are satisfied; (b) that there exists a substantial federal constitutional question; (c) that under the Act challenged criminal penalties would attach to each violation thereof; (d) that the prevention of criminal proceedings under an alleged unconstitutional statute is essential to safeguard rights of property; (e) that the danger of irreparable loss to plaintiffs is both great and immediate; (f) that the criminal statute would cripple the plaintiffs' business by threatening a multiplicity of criminal prosecutions or by imposing repeated heavy fines, and (g) that the plaintiffs may not be in a position to try the issue in the criminal proceeding. *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Gibbs* v. *Buck*, 307 U. S. 66 (1939); and other cases above cited.

Measured by these firmly established principles, it is apparent that the complaint sets forth facts sufficient to invoke equity jurisdiction to restrain enforcement of the Act pending determination of its validity by the judicial branch of the government. The complaint shows that the amount in controversy as applies to each appellant exceeds the jurisdictional amount, that there exists a substantial constitutional question as to the validity of the Act and the regulations promulgated thereunder, that under the Act criminal penalties would attach to each violation thereof, that the prevention of criminal proceedings is essential to safeguard appellants' property rights and to prevent a multiplicity of criminal prosecutions which would cripple the business of the appellants, that appellants may not be able to raise at the criminal trial the issue of the validity of the Act and of the regulations issued by the Administrator purporting to act under authority of the challenged legislation, and that irreparable loss and damage would result to appellants from the

continuation of the prosecution of the enforcement of the Act and the regulations promulgated thereunder (R. 8 to 30).

The allegations of the complaint were admitted by the motion to dismiss, which admits all well pleaded facts. *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

In circumstances similar to, (and in many cases less strong than), those appearing in this case, this court has repeatedly held that the equity jurisdiction has been properly invoked. In *Gibbs* v. *Buck*, 307 U. S. 66 (1939), Mr. Justice Reed said (307 U. S. 76):

> "The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction. Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below. Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied."

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), this Court, in reversing the refusal of a three-judge district court to enjoin enforcement of the National Industrial Recovery Act of June 16, 1933, withdrawing "hot oil" from interstate shipment, declared (293 U. S. 414):

> "The statute provides that any violation of any order of the President issued under § 9 (c) shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both. *We think that these penalties would attach to each violation, and in this view the plaintiffs were entitled to invoke the equitable jurisdiction to restrain enforcement, if the statute and the Executive orders were found to be invalid.* Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620, 621; Terrace *v.* Thompson, 263 U. S. 197, 214-216; Hygrade Provision Co. *v.* Sherman, 266 U. S. 497, 499, 500."*

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194 (1934), a three-judge district court was convened to consider a complaint filed to enjoin the enforcement of the New York Milk Control Law of April 10, 1933. The district court dismissed the complaint on defendant's motion. This Court in reversing the judgment of the district court in dismissing the complaint said (293 U. S. 208):

> "But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court."

and unanimously held, at page 213:

> "While the complaint is lacking in the specific and definite allegations as to trade conditions which would be appropriate to the plaintiff's assertions in

* Italics supplied unless otherwise indicated.

supporting its attack on the statute, we think that the plaintiff should not be refused standing in court upon the allegations made. As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½".

See also *Campbell* v. *Medalie,* 71 F. (2d) 671 (C. C. A. 2nd, 1934).

It being apparent that the complaint herein sets forth a cause of action cognizable by a court of equity, the propriety of the action of the court below in dismissing the complaint and in holding that Section 204(d) of the Emergency Price Control Act of 1942 denied the court jurisdiction and power to consider the complaint and grant the relief prayed for, will now be considered.

Before considering the validity of the action of the lower court, however, and in order to avoid any misunderstanding, it should be pointed out that the appellants do not question the right of Congress, as a war measure, to regulate prices or to take their property entirely within the limits provided by the Constitution. It is appellants' contention that this case raises only questions of law and does not require any discussion of patriotism or of the power of our federal government under the Constitution to prosecute efficiently the present war. The Fifth Amendment was adopted as a limitation upon every power granted to the federal government, including the power to wage war. In the emergency created as a result of the present world-wide war, the courts should zealously regard those rights granted to each citizen by the Constitution. *Ex Parte Milligan,* 4

Wall. 2 (1866); *U. S.* v. *L. G. Cohen Grocery Co.*, 255 U. S. 81 (1921). Appellants' contention is simply that they be not deprived of their property without due process of law. They should be given an opportunity to test the validity of the Emergency Price Control Act and the regulations promulgated thereunder in accordance with time honored procedure within the constitutional judicial power of the federal courts, before being subjected to criminal trial and possible conviction with the resultant irreparable loss of liberty and damage to their property.

POINT I.

The lower court erred in holding that Section 204(d) of the Emergency Price Control Act of 1942 withdrew from the court jurisdiction and power to entertain the complaint and grant the relief prayed for and in dismissing the complaint for want of jurisdiction.

A.

Section 204(d) as construed and applied by the Court below is unconstitutional in that it infringes upon the judicial power of the federal courts of equity in violation of Article III, Section 1 of the Constitution of the United States.

Article III, Section 1 of the Constitution of the United States provides: "The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, Clause 1, provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *".

The plain language of these provisions and the decisions of this Court demonstrate conclusively that the judicial power is vested exclusively in this Court and such inferior courts as may be established by Congress. *Martin* v. *Hunter's Lessee*, 1 Wheaton 304 (1816); *United States* v. *Klein*, 13 Wallace 128 (1872).

This vesting of the judicial power in one coordinate and independent branch of the federal government was not done by the framers of our Constitution by mere chance. It was done deliberately from a full knowledge of the history of the English judiciary and out of an abundance of experience acquired under the colonial governments before the Revolutionary War.

From the doctrine of the separation of powers springs the immunity from legislative control of all inherent and essential elements of judicial power. *United States* v. *Klein*, 13 Wallace 128 (1872); *Michaelson* v. *United States*, 266 U. S. 42 (1924). This immunity is analogous to that of the executive from interference with his inherently executive power. See *United States* v. *Klein*, 13 Wallace 128, (1871); *Myers* v. *United States*, 272 U. S. 52 (1926); *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935).

It is beyond question that the power of judicial review is an essential attribute of the judicial power given to the courts by the Constitution. In *Marbury* v. *Madison*, 1 Cranch 137 (1803), Chief Justice Marshall said (1 Cranch 176):

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply."

In *Ableman* v. *Booth*, 21 How. 506 (1858), Chief Justice Taney declared (21 How. 520):

"The judicial power covers every legislative act of Congress whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachments upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an Act of Congress is not pursuant to and within the limits of the power assigned to the federal government it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any Act of Congress is brought before them and it is their duty to declare the law void and refuse to execute it if it is not pursuant to the legislative powers conferred upon Congress * * *."

Again in *Gordon* v. *United States*, 117 U. S. 697, Chief Justice Taney said (p. 705):

> "Whether an Act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution."

There can be no doubt that the power of a federal court of equity to restrain the enforcement of a statute alleged to be unconstitutional pending judicial determination of its constitutional validity is a necessary attribute of the inherent judicial power granted exclusively to the federal courts by the provision of the Constitution above quoted. See *Porter* v. *Investor's Syndicate*, 286 U. S. 461 (1932), where this court in interpreting a provision of the Montana Blue Sky Law so as not to prevent the grant of a stay during review of an order revoking a license, declared that a contrary interpretation would constitute a denial of due process. See also *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923), and *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923), where it is stated that the refusal of interlocutory relief to a public utility claimed to be daily suffering from confiscation from rates set by a Commission, would be a denial of a constitutional right.

In *A.P.W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935), the court denied the motion of the government to dismiss the complaint which sought to restrain the Collector of Internal Revenue from collecting processing taxes under the Agricultural Adjustment Act of May 12, 1933 as amended by the Act of May 9, 1934. In disposing of the government's contention that the act which provided "no suit, action or proceeding (including probate, adminis-

tration, receivership and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed * * * on or after the date of this amendment * * *", denied the court jurisdiction to entertain the action, the court said (12 F. Supp. 742):

> "But that the Congress may by unconstitutional statutes, denominated a tax law, take the property of the citizen without due process of law and then in the same statute forbid the citizen to seek injunction in a court of equity without giving him an adequate remedy at law has yet to be established by the highest authority. There are authorities which at least inferentially hold to the contrary. Nichols *v.* Coolidge, 274 U. S. 531, 542, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081; Brinkerhoff-Faris Trust & Savings Co. *v.* Hill, 281 U. S. 673, 679, 50 S. Ct. 451, 74 L. Ed. 1107; Graham & Foster *v.* Goodcell, 282 U. S. 409, 431, 51 S. Ct. 186, 75 L. Ed. 415.
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> * * * * * *
>
> If this AAA statute transcends the delegated powers of the federal government and is therefore unconstitutional, or if it is unconstitutional solely because of the prohibited delegation of legislative power to the executive branch of the government, or for any other reason, the whole tax scheme of the statute must fall before the constitutional bar, and section 21 (a) restraining injunction on equity against the collections would seem to fall with it.
>
> Were it otherwise, Congress could by unconstitutional legislation under the guise of a tax law, take the property of the citizen without due process of law, or otherwise deprive the citizen of his constitutional rights, and by the mere device of prohibiting in such legislation redress at law or suit in equity,

could prevent the citizen from seeking and the courts from granting redress, and there would be no possible way of having a judicial determination of the constitutionality of the statute or of preventing the collection of taxes unconstitutionally exacted or of recovering such taxes or of preserving the constitutional rights of the citizen.

* * * * * * *

"Congress may not encroach upon the equity jurisdiction of the court intended by the Constitution. Michaelson *v.* United States, 266 U. S. 42, 64, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451."

In *Winston & Co.* v. *Georgia & F. R. R.*, 34 F. (2d) 163, (D. C. W. D. So. Car. 1929), the Court said (34 F. (2d) 167):

"The equitable jurisdiction of a federal court is derived from the Constitution, and cannot be limited either by state statutes or acts of Congress."

In *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (D. C. N. D. Ohio 1935) the Court said (11 F. Supp. 206):

"Save in respect of equitable rights arising under the Constitution, the Congress has the power to limit the jurisdiction of the court of equity in respect of the issuance of injunctions * * *"

In that case, the Court held that notwithstanding the provisions of 47 Stat. 70, 71, commonly known as the Norris-LaGuardia Act, which denied to any court the right to issue injunctions in certain enumerated circumstances, it could nevertheless issue an injunction to preserve and protect the property committed to it under the provisions of the bankruptcy act to prevent irreparable loss and damage.

Not only the cases abovementioned but also the cases cited in the introductory statement establish that the power

of a court of equity to restrain enforcement of an alleged unconstitutional statute pending judicial determination of its validity is an attribute inherent in the judicial power vested exclusively in the judicial department by the Constitution. This being so, it is clear that Congress has no power to destroy or infringe upon this aspect of judicial power.

In *United States* v. *Klein*, 13 Wall. 128 (1871), there was up for consideration the Act of Congress which provided in substance (13 Wall. 143):

> "* * * that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or accep-

tance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed."

In holding this act unconstitutional as an attempt by the Legislature to infringe upon the judicial power, Chief Justice Chase said (13 Wall. 146):

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

* * * * * *

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction 'The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the court of claims on appeal. Can it prescribe a

> rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

In *Michaelson* v. *United States*, 266 U. S. 42 (1924), this Court said (266 U. S. 64):

> "If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect to its validity would be presented * * *."

In that case, the court pointed out that notwithstanding the control of Congress over the inferior federal courts, it cannot adopt a statute which will render practically inoperative the power of those courts to function, the court saying that (266 U. S. 66):

> "The attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

In the light of these authorities we turn to an examination of the challenged act. The pertinent part of Section 204(d) provides that:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or

price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

It is clear that this section is nothing more than a legislative attempt, under the guise of its admitted power to regulate the jurisdiction of the lower federal courts, to infringe upon the judicial power of a court of equity to grant an injunction to restrain the enforcement of an unconstitutional act.

The lower court, in construing and applying this section, held that it deprived it, and necessarily all lower federal courts sitting in equity, of the constitutional judicial power to enjoin the enforcement of the act even though it be unconstitutional.

If Congress can constitutionally deprive all courts of jurisdiction and power to restrain the enforcement of one unconstitutional act, thus in effect imposing upon the courts a rule of decision that in all circumstances in all actions brought to enjoin the enforcement of the Act the courts must hold the act constitutional, there would be no constitutional barrier to Congress doing likewise with respect to all Congressional enactments. Nor would there then be any limitation upon the power of Congress to provide that no lower federal court has the jurisdiction or power to hold any act of Congress unconstitutional, thus in effect imposing upon the courts a rule of decision that in all cases where an act of Congress is brought into question, the courts must declare the act constitutional. Nothing would then prevent Congress from denying this Court appellate jurisdiction where the validity of an act of Con-

gress has been brought into question. Thus, if Congress has the power accorded to it by the judgment of the court below, nothing could prevent it from utterly destroying the judicial power vested exclusively in the judicial department of the federal government.

Obviously this is not the law. Congress may not, in the guise of defining the jurisdiction of a court, impose upon it a rule for deciding a case or controversy.

In view of Article III, Section I, and the cases cited herein, it is submitted that Section 204(d) as construed and applied by the lower court is unconstitutional and the judgment of that court should therefore be reversed.

B.

Section 204(d) as construed and applied by the lower court is unconstitutional because it deprives appellants of their property without due process of law in violation of the Fifth Amendment.

In addition to the reasons set forth under A herein, it is submitted that Section 204(d) as construed and applied by the lower court is unconstitutional as being in conflict with the Fifth Amendment in that it deprives appellants of their property without due process of law.

It has been shown in the introductory statement to this Point that a federal court of equity will restrain the enforcement of an alleged unconstitutional statute in the circumstances disclosed in the complaint herein. The part of the Act in question, quoted under A herein, purports to deny that power to all Courts, Federal, State, or Territorial.

Whenever Congress has enacted legislation withdrawing from a court the power to act, the courts have examined the particular statute involved in order to determine whether the judicial power has been vested in another tribunal in a

manner adequately protecting the party affected. Thus, in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), where a limited amount of jurisdiction was withdrawn from a district court to enjoin certain activities under the National Labor Relations Act, this Court said (303 U. S. 48):

> "The grant of that exclusive power is constitutional because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals adequate opportunity to secure judicial protection against possible illegal action on the part of the Board."

And concluded by saying (303 U. S. 50):

> "Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. Anniston Mfg. Co. v. Davis, 301 U. S. 337, 343-346."

An examination of Section 204 of the Act demonstrates conclusively that no other adequate remedy has been provided. After providing in Section 204(a) that any person who is aggrieved by the denial of a protest made to the Administrator may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals created pursuant to sub-section (c) thereof, it is provided in sub-sections (b) and (c) as follows:

> "(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part,

any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."

"(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. • • •".

These statutory provisions limit the jurisdiction of the Emergency Court of Appeals to a review of any regulation or order promulgated by the Price Administrator and then only in cases where a protest has been filed with the Administrator under Section 203 of the Act and the protest has been denied by the Administrator. While in sub-

section (b) the Act would seem to give the Emergency Court of Appeals the power to enjoin or set aside any regulation, order or price schedule promulgated by the Administrator where it appears that it is not in accordance with law, or is arbitrary or capricious, nowhere is the Emergency Court of Appeals given the power to enjoin the enforcement of the Act. Furthermore, this limited grant of power to enjoin any order or regulation is illusory. It is nullified because section (b) goes on to provide that:

> "* * * The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof".

Section (b) then further provides that if a petition for a writ of certiorari is filed with this court within such thirty days, the effectiveness of such judgment shall be postponed until an order denying such petition becomes final or until other final disposition of the case by this court.

Taken in connection with the provisions of section (c), that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining in whole or in part the effectiveness of any regulation or order promulgated by the Administrator, it is clear that the Emergency Court of Appeals, although called a court, is merely another agency in the administrative process.

This is made even more clear, if anything further is necessary, by the proviso in sub-section (a) that the Administrator may at any time modify or rescind any regulation, order or price schedule, notwithstanding the pendency of a complaint in the Emergency Court of Appeals. These provisions clearly demonstrate that the Emergency Court

of Appeals is a court in name only. It lacks the one fundamental essential of a court. There is no finality to the judgments it renders. The capacity to render a final decision on all the issues before it which will be conclusive upon the parties is the distinguishing characteristic of judicial power. Without such finality of decision the power exercised is not judicial power. See *Hayburn's Case*, 2 Dallas 409 (1792); *United States* v. *Ferreira*, 13 How. 39 (1851); *Gordon* v. *United States*, 117 U. S. 697 (1864); *United States* v. *Jones*, 119 U. S. 477 (1886); see also *Pocono Pines etc.* v. *The United States*, 73 Court of Claims, 447 (1932).

Since the Emergency Court of Appeals (a) has no power to enjoin the enforcement of the Act (b) is denied the power to issue any temporary restraining order enjoining the effectiveness of any regulation or order promulgated under the Act, and since (c) any judgment of the Court holding any regulation or order invalid is inoperative for a period of thirty days it is clear that it is not a court and can only be considered part of the administrative process established by the Act.

In addition, the administrator can nullify any action of the Emergency Court of Appeals by resorting to two obvious expedients conveniently placed at his disposal—he could file an application for a writ of certiorari to this Court which would stay the operation of the judgment of the Emergency Court of Appeals or he could render the judgment utterly void by modifying or rescinding the regulation or order deemed to be invalid by the Emergency court, and the aggrieved party would then have no other recourse but to start all over again by filing a protest with the Administrator. This procedure could be continued indefinitely during which time the aggrieved party's property could be utterly destroyed. Under the construction placed

upon Section 204(d) by the court below, he would be without any remedy whatsoever to protect himself and his property.

It requires no argument to demonstrate that Section 204(d) as thus construed and applied by the lower court deprives an aggrieved party of his property without due process of law in violation of the Fifth Amendment. It has been repeatedly held by this court that a person is entitled to equitable relief by way of injunction restraining the enforcement of an alleged unconstitutional statute where his property is being confiscated, in order to prevent irreparable loss and damage pending judicial determination of the challenged legislation. *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924); *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923); *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43 (1923); *Mt. States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167 (1936); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).

In *Porter* v. *Investors Syndicate, supra*, Mr. Justice Roberts said (p. 471):

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440, 454. But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. *v.* Kuykendall, 265 U. S. 196, 203, 204) or the decisions of the state court interpreting the act (Oklahoma Natural Gas Co. *v.* Russell, 261 U. S. 290) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in

cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

And it has been held that statutes which deny an injunction to a public utility pending review of the fairness of a rate order are unconstitutional under the due process clause. *Mt. States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167 (1936); *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924).

Finally, the statutory provision referred to (Section 204(a)) gives the right to protest only a regulation or order of the Administrator. There is no right to protest if the Administrator fails to act. Similarly, the right of review in the Emergency Court of Appeals, just discussed, is limited to a review of regulations and orders promulgated by the Administrator.

The gist of the complaint in the present case is that the Act requires "non-action" on the part of the Administrator with respect to live stock, that in any event he has not acted with regard thereto, and that the provisions of the Act set up a scheme and device with respect to the meat industry which is discriminatory and confiscatory, thereby destroying and taking the property and businesses of the appellants.

There is no method under the Act whereby a person may protest such "non-action" of the Administrator. Is a person thus aggrieved denied any and all relief in any court? Must he sit by, although his constitutional rights have been invaded and his business destroyed? Can it be said that as to that kind of situation, the district court is deprived of jurisdiction by virtue of the provisions of the Act just adverted to?

The invalidity of the Act becomes doubly apparent in the light of the decision of the Alabama Supreme Court in *Kittrell* v. *Hatter*, 10 So. (2d) 827 (Nov. 1942) holding that Section 204(d) deprived the state courts of jurisdiction over an action to enjoin enforcement of the Act. The decision of the Alabama court is predicated upon the principle that Congress may withhold from state courts jurisdiction over a matter within the judicial power of the United States. It is well settled, however, that the jurisdiction of state courts in respect to federal questions may be eliminated by Congress only where it chooses to make the federal jurisdiction exclusive. *Martin* v. *Hunter's Lessee*, 1 Wheaton 304 (1816); *Gaines* v. *Fuentes*, 92 U. S. 10 (1875); *Plaquenines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511 (1898). It therefore follows that the denial of jurisdiction to the state courts must be predicated upon the grant of exclusive jurisdiction to the federal courts. Since Section 204(d) as construed by the lower courts denies to the federal courts jurisdiction to enjoin the enforcement of the Act, it is unconstitutional because, as so construed, there is no court, either state or federal, in which an aggrieved party may obtain relief against the danger of irreparable loss and damage pending the judicial determination of the validity of the challenged statute.

The suggestion contained in the majority opinion of the lower court that Section 204(d) of the Act does not preclude a person from raising the defense of the unconstitutionality of the Act to any action brought against him under the Act, does not save Section 204(d) from the constitutional infirmity herein discussed. If a party must wait to question the validity of an Act until proceedings have been brought against him, no argument is required to demonstrate that until such proceedings are brought against him, he may suffer irreparable loss and damage. Under the

cases discussed herein that would constitute a deprivation of his property without due process of law in violation of the Fifth Amendment.

C.

Section 204(d) deprives appellants of their right at the trial of the indictments found against them to raise as a defense the invalidity of the regulations issued by the Price Administrator, thus depriving appellants of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and denies to appellants a full, fair, complete and impartial trial on all the issues involved on the indictments returned against them within the State and district wherein the alleged crimes were committed, in violation of Article III, Section 2, Clause 3, of the Constitution of the United States and in violation of the Sixth Amendment to the Constitution of the United States.

The District Court of New Jersey, by the provisions of Title 28, U. S. C., Section 41(2), has jurisdiction "of all crimes and offenses cognizable under the authority of the United States".

Section 205(c) of the Emergency Price Control Act provides that:

> "The District Court shall have jurisdiction of criminal proceedings for violations of Section 4 of this Act".

Article III, Section 2, Clause 3 of the Constitution provides:

> "The trial of all crimes • • • shall be held in the state where the said crimes shall have been committed".

And the Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the state and district wherein the crime shall have been committed * * *".

By these provisions appellants must be tried in the district within which the offense is charged to have been committed. *United States* v. *Jackalow*, 1 Black 484 (1861). By force of these provisions and the 5th Amendment, appellants are guaranteed a trial according to the settled rules of the common law. In *Callan* v. *Wilson*, 127 U. S. 540 (1888), this Court said (127 U. S. 549):

> ". . . the guarantee of a trial by jury in the Third Article implied a trial in that mode and according to the settled rules of the common law; the enumeration in the Sixth Amendment of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have, in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

In *Chambers* v. *Florida*, 309 U. S. 227 (1940), this Court said (309 U. S. 235):

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—*just as that in the Fifth*—has led few to doubt that it was intended *to guarantee procedural standards adequate and appropriate*, then and thereafter, to protect, at all times, * * *".

In *Edwards* v. *United States*, 312 U. S. 473 (1941), this Court declared (312 U. S. 482):

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeletion which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

Again in *Adams v. United States*, 317 U. S. (Ad. Op.) 269 (1942), this Court again declared (317 U. S. (Ad. Op.) 275):

> "Certain safeguards are essential to criminal justice. * * * But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property'.
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> * * * * * *
>
> "The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

From these pronouncements, it is apparent that this Court has repeatedly emphasized the safeguards which a

person accused is entitled to at a criminal trial. It is well settled that an indictment based upon an invalid law is no indictment at all. In *Ex Parte Royall*, 117 U. S. 241 (1886), this Court said (117 U. S. 248):

> "But with respect to the other propositions, it is clear that if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceedings against him is a nullity. As was said in *Ex parte* Siebold, 100 U. S. 376, 'An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void and cannot be a legal cause of imprisonment.'"

By force of the same reasoning, it is equally clear that if the regulation under which a person is indicted is invalid or repugnant to the Constitution, the entire proceedings against him is a nullity.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), Mr. Justice Stone said (304 U. S. 152):

> "We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

It follows from the foregoing decisions, therefore, that every person accused of crime must be given the opportunity on the trial of the indictment to put in question the validity of the regulation, order or act under which the indictment is founded. The appellants here, therefore, are

entitled, as a matter of constitutional right, to establish by the production of all evidence necessary to prove their contention that the regulation set forth in the indictments is invalid. Unless they are afforded this right, it is clear that their constitutional rights have been violated.

A denial of this right under the present circumstances would be particularly onerous in view of the following testimony of Price Administrator Brown before the Small Business Committee of the House:[1]

> "The Chairman: Do you believe that law has been complied with, Mr. Brown?
>
> Mr. Brown: It is difficult for me to answer, Mr. Chairman. I think, to be perfectly frank, that it could be said that our regulation at times is in violation of that law, particularly that at the present time with respect to small packers. Now it is very largely a question of judgment. I don't know how or where you can draw the line and say so many small packers will of necessity fall down under a legal administration."

Although the appellee stated at the argument in the court below that a person may challenge the validity of the Act by way of defense on the trial of an indictment founded upon the Act and the regulations promulgated thereunder, it was not suggested at any time that the validity of the regulations promulgated by the Administrator could be questioned as part of the defense interposed at the trial of the indictments.

The complaint alleges that indictments have been returned against appellants wherein they are charged with

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[1] Hearings before the Select Committee to conduct a study and investigation of the National Defense Program in its relation to small business in the United States House of Representatives, Seventy-eighth Congress, First Session on H. Res. 18, April 8 and 9, 1943, Part 5 (Unrevised).

violating (in the State of New Jersey) Section 4 of the Act and certain regulations promulgated under the Act. It is further alleged that the appellants have, by appropriate pleadings, challenged the validity of certain indictments asserting, *inter alia* (a) that they do not charge a crime against the United States; (b) that the Act upon which they are based is unconstitutional; (c) that the regulations upon which they are based are unconstitutional. It is also alleged in the complaint that because of the unconstitutionality of the Act, and the regulations promulgated thereunder are not in some respects patent, but must be established by competent evidence which can be produced, the trial court may decline to pause in said trial upon said indictments to receive such evidence and appellants thereby will be unable adequately and properly to present such issues to the trial court.

Where the invalidity of a statute or regulation promulgated thereunder can only be demonstrated by an extensive examination of complicated facts, this Court has declared that a trial on a criminal indictment for violating the act would furnish no adequate opportunity for the presentation of such defense. In *Ex Parte Young*, 209 U. S. 123 (1907) Mr. Justice Peckham said (209 U. S. 164):

> "If, however, one should be found [an indictment] and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. • • • Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate

opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.

"To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

Section 204(d) which purports to deny the trial court of the power to determine and decide the challenges to the validity of the indictments interposed by the appellants, is clearly unconstitutional as being repugnant to Article III, Section 2, Clause 3 of the Constitution and the Fifth and Sixth Amendments thereto, therefore a proper case is presented for the interposition of a court of equity to restrain the enforcement of the Act pending judicial determination of its validity.

See *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937), where Mr. Justice Cardozo said (300 U. S. 214):

"'Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' Davis *v.* Wakelee, 156 U. S. 680, 688. * * * *A remedy at law does not exclude one in equity, unless it is equally prompt and certain and in other ways efficient.* * * *"*

D.

Section 204(d) being an integral part of the Act is invalid because of the invalidity of the substantive provisions of the Act.

The complaint herein challenges not only Section 204(d) of the Act but also challenges the substantive provisions purporting to grant to the Price Administrator the power to fix maximum prices and placing arbitrary limits on the Administrator's power to establish any maximum price for any agricultural commodity including livestock. Under Points II and III herein the unconstitutionality of these substantive provisions are discussed. If the substantive provisions of the Act are unconstitutional, Section 204(d) which is an integral part thereof must likewise be rendered invalid even though the Act states that if any provision of the Act is declared unconstitutional the remainder of the Act shall not be affected thereby. *Hill* v. *Wallace*, 259 U. S. 44 (1922), *U. S.* v. *Reese*, 92 U. S. 214 (1875), *Champlin Refining Co.* v. *Commission*, 286 U. S. 210 (1932), *Williams* v. *Standard Oil*, 278 U. S. 235 (1929).

A situation similar to that existing in the present case existed with respect to the Agricultural Adjustment Act of May 12, 1933, as amended by the Act of May 9, 1935. That Act provided that:

> "No suit, action or proceeding (including probate, administration, receivership and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed * * * on or after the date of this amendment."

Notwithstanding this provision of the Act, in *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935),

the Court enjoined the collection of the taxes assessed thereunder both before and after the amendment, saying (12 F. Supp. 742):

> "If this AAA statute transcends the delegated powers of the federal government and is therefore unconstitutional, or if it is unconstitutional solely because of the prohibited delegation of legislative power to the executive branch of the government, or for any other reason, the whole tax scheme of the statute must fall before the constitutional bar, and section 21(a) restraining injunction on equity against the collections would seem to fall with it."

POINT II.

The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the administrator in violation of Article 1, Section 1 of the Constitution. The Act sets no policy or standard sufficiently definite to guide the administrator in the exercise of the delegated powers.

The constitutional principle is fundamental that the legislature may not abdicate its function and delegate purely legislative functions to the executive department of the Government.

Field v. *Clark*, 143 U. S. 649 (1892);
J. W. Hampton, Jr. & Co. v. *United States*, 276 U. S. 394 (1928);
Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935);
Schechter Corp. v. *United States*, 295 U. S. 495 (1935).

This principle was summarized in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), where Mr. Chief Justice Hughes said (293 U. S. 421):

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, Par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, can not be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

The foregoing case involved Section 9(c) of the National Industrial Recovery Act, which authorized the President "to prohibit transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from stor-

age by any State Law or valid regulation or order prescribed thereunder, by any board, commission, officer, or any other duly authorized agency of a state". In declaring this provision unconstitutional on the ground that it constituted an unauthorized delegation of legislative powers to the President, the Court said (293 U. S. 430):

> "We think that §9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> "If §9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

Schechter Corp. v. *United States*, 295 U. S. 495 (1935), involved the validity of Section 3 (a) of the National Industrial Recovery Act, authorizing the President to approve codes of fair competition "for trades and industries". The Statute provided that codes may be approved upon application of one or more trades or industrial groups, if the President found (1) that such associations impose no inequitable restrictions on membership, and are

representative, and (2) that the codes are not designed to promote, monopolize or to eliminate small industries or to discriminate against them. It further provided that the President may as a condition of approval of any code, impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interests, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

In holding that such a sweeping delegation of legislative power found no support in the decisions of the Supreme Court, the Court said (295 U. S. 541):

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, §3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Applying the principle of these cases to the present case, the conclusion is inevitable that the Emergency Price Con-

trol Act must be declared unconstitutional as an improper delegation by Congress of its legislative functions. By this Act Congress has conferred upon the Administrator not merely the power to fill up the details in the general scheme of the Act, or to exercise the administrative function of applying a general principle or standard, but complete and comprehensive authority to determine what the Act shall include, when it shall begin to operate, and when price schedules, regulations, or orders shall terminate.

The general purposes of the Act are stated in Section 1 (a) as follows:

> "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

In order to carry out the stated purposes of the Act Congress has delegated to the Administrator in section 2 (a) virtually complete discretion in the matter of fixing maximum prices. Section 2 (a) provides:

> "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order * * * the Adminis-

trator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. * * * Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2 (c) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

By Section 2(h) of the Act it is further provided that the powers granted by Section 2 shall not "be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry".

It will thus be seen that under the provisions of this Act the power to determine on what commodities price ceilings should be placed is wholly discretionary and not mandatory. Although Section 2(a) uses the word "shall" when dealing with the ascertainment and consideration of prices prevailing on any date and for the making of adjustments, it, nevertheless, provides that in establishing any maximum price the Administrator shall do so only so far as practicable. Whatever mandatory effect these words may have is completely emasculated by Section 2(c) which, it should be observed, provides that any regulation may be established in such form and manner, contain such classifications and differentiations, and provide for such adjustments and exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This latter provision, when considered with the words "so far as practicable", clearly shows that the Administrator is not compelled to follow any specified or certain standard but may fix any price which he may choose without taking into consideration any of the elements specified in Section 2(a). Thereby no mandatory standard is established by the Act.

Moreover, there is no requirement in the Act that the Administrator must fix a price ceiling on every commodity which rises or threatens to rise. He may fix ceilings on some commodities and leave others alone. He may, under the terms of the Act, even differentiate between commodities in the same class. Thus, he may fix a ceiling on the price of chickens but not on ducks or geese. In addition, he may terminate any price schedule whenever he wishes and reimpose a ceiling whenever he chooses. This gives him such an unbounded discretion, in the words of Justice Cardozo as to amount to "delegation running riot".

Thus, the Administrator has not only been given the power to determine what prices should be fixed and what commodities should be covered by the price ceilings, but also the power to determine when a price ceiling shall begin and when it shall terminate. Congress has thereby failed to define the circumstances and conditions under which the Administrator should act and in the same manner Congress has failed to set up any standard sufficiently definite to guide him in his determination as to the period for which each price ceiling should exist.

Nor is the Administrator obliged to depend upon any specified procedure for the determination of the circumstances and conditions under which the ceiling is to be imposed or discontinued. Even fixing of the price ceiling is left to the uncontrolled discretion of the Administrator. Although Section 2(a) provides that consideration should be given to the prices prevailing between October 1 and October 15, 1941 and that he shall make adjustments for such relevant factors as he might determine and deem to be of general applicability, such as speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of commodities during and subsequent to the year ended October 1, 1941, as we have already pointed out, he is not compelled to act upon such facts. All he is required to do is to consider them. So long as he considers them he may disregard them completely. Again, this is not sufficient to provide a certain or definite standard for the setting of a price ceiling.

Nor can it be reasonably argued that the exercise of the powers conferred by the Act is merely a ministerial function delegated to the Administrator. If he may set a ceiling or unmake it, if he may apply it to all or none of the commodities sold in this country, if he may extend it

to competing commodities or restrict it to enumerated commodities, if he may begin and end its application and determine its duration, if he may fix the extent of the ceiling, then and under such conditions the powers exercised by him cannot be said to be merely administrative but are, without question, discretionary. As such they clearly violate the constitutional prohibition against the delegation of powers for by their exercise it is the Administrator and not Congress who performs the legislative function. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Corp.* v. *United States*, 295 U. S. 495 (1935).

It is submitted under this point that the Emergency Price Control Act of 1942 as amended by the Inflation Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator.

POINT III.

The Emergency Price Control Act makes an unconstitutional, discriminatory classification in fixing prices on agricultural commodities and commodities processed or manufactured from any agricultural commodity.

The general scheme for fixing maximum prices on commodities is provided in Section 2(a) of the Act which purports to authorize the Administrator to establish such price ceilings on commodities as in his judgment shall be generally fair and equitable and will effectuate the general purposes of the Act.

The power conferred by Section 2 is restricted, as provided in Subsection (f) thereof, in accordance with the provisions of Section 3. An analysis of that Section demonstrates that in an industry such as the meat industry

the Act provides for two classifications of the products of the industry, *i. e.*, live stock and dressed meats, as to which there are different levels or standards of prices.

The classification of the industry's products into livestock and dressed meats comes about through the use of the phrase "agricultural commodity" in Section 3, Subsections (a), (b), (e) and the phrase "commodity processed or manufactured in whole or substantial part from any agricultural commodity" in Section 3(c).

Dressed meats and processed meats unquestionably are commodities processed or manufactured from an agricultural commodity, *i. e.*, livestock. Consequently, dressed and processed meats do not come within the price regulations of Section 3 which relate only to agricultural commodities and therefore these products are subject to the power of the Administrator to fix prices under Section 2(a).

The Act was amended by the Inflation Act of October 2, 1942, which maintained the same distinctions between agricultural commodities and products processed from agricultural commodities.

The scheme of the Emergency Price Control Act and the Inflation Control Act provides a special minimum standard for agricultural commodities by leaving unregulated the price of live stock to the extent (a) that its minimum price is not less than 110 per cent of the parity price as provided in section 3(a) of the Emergency Price Control Act or (b) that its minimum price is not less than the parity price as provided in section 3 of the Inflation Control Act. This last stated price standard is currently applicable with respect to agricultural commodities as the provisions of section 3(a) of the Emergency Price Control Act have been suspended by an executive order pursuant to authority granted by section 2 of the Inflation Control Act. These standards permit stock raisers to sell at an

unregulated price so long as it does not exceed parity, whereas the price of dressed and processed meats is fixed by the Administrator, which price may be and in fact is so out of line with the price of live stock, that it is unprofitable for slaughterers, under actual trade conditions, to purchase live stock for butchering and processing. The inevitable result of this discrimination is that the processors have to a great extent refused to slaughter since they can only do so at a loss.

The Act in making this arbitrary classification among operators within the meat industry produces a result whereby appellants' businesses are destroyed. The Act thus deprives them of their property by a discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment. *Currin* v. *Wallace*, 306 U. S. 1 (1939); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Wilson* v. *McDonnell*, 265 Fed. 432 (Ct. App. D. C., 1919); Writ of Error dismissed, 257 U. S. 665 (1921).

Live stock and dressed meats have a relationship such that a separate classification permitting a preferential treatment for live stock with respect to price produces a result most burdensome on slaughterers, wholesalers and other dealers in the meat industry. This Court, in *United States* v. *Carolene Products Company*, 304 U. S. 144 (1938), speaking of discriminatory classifications, said (304 U. S. 153):

> "• • • we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class is so different from others of the class as to be without the reason for the prohibition • • •."

It follows that a statutory classification which excludes one of a type of products having a close economic relationship may be shown to be such a discrimination as to amount to a deprivation of property in violation of due process under the Fifth Amendment.

In determining whether or not there is an arbitrary classification under the Act, the provisions of the Act must be considered in connection with the economic facts of the meat industry and their constitutionality must be viewed in the light of the peculiar facts of that industry. These facts are not before the Court and, if on this appeal it is determined that the district court of three judges to which appellants complaint was presented has jurisdiction to hear the matter the case should be remanded to the trial court to find the facts. *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194 (1934). In that case the constitutionality of the New York Milk Control Law of April 10, 1933, was in question. The law authorized the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than 1,000,000 inhabitants. The Board established a differential of one cent a quart in favor of dealers not having a "well advertised trade name".

The decision of the district court granting a motion to dismiss the bill was reversed for the reason that the court failed to take into consideration any findings of fact to support its ruling. In commenting on the lack of evidence before the Supreme Court on appeal, Mr. Chief Justice Hughes said (293 U. S. 208):

> "But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the com-

> plaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court."

The decree of the court below dismissing the complaint was reversed and the cause was remanded to that court for further proceedings.

Whether the provisions of the Act which permit the establishment of a price ceiling upon dressed meats and prevent the establishment of price ceilings on live stock constitute a denial of due process to appellants and others similarly situated cannot be determined by the Court on a motion to dismiss but must be adjudicated upon a trial where all the facts concerning the integration of the meat industry and the arbitrary classification between stock raisers and meat handlers may be presented to the trial court.

CONCLUSION.

For the reasons set forth herein it is respectfully submitted that the lower court erred in dismissing the complaint. Accordingly, the judgment of the lower court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,

Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

APPENDIX TO BRIEF FOR APPELLANTS.

HAROLD SIMANDL,
Attorney for Appellants;

ARTHUR T. VANDERBILT,
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APPENDIX.

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Title I—General Provisions and Authority.

PURPOSES; TIME LIMIT; APPLICABILITY.

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with

wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c) The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES.

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing

between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult

with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with

the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this

section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3, and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the

Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any

agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

Title II—Administration and Enforcement

ADMINISTRATION

SEC. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other

agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the

purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed $250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with

a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in

the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (e), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Adminis-

trator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the

determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206; and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the de-

fendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring

suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such

a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed $100,000 per annum. Within thirty days after the entry of the judgment or order of any court either sus-

pending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

Title III—Miscellaneous

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such report shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The term "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in

the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such

commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

AN ACT

To amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

SEC. 2. The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

SEC. 3. No maximum price shall be established or maintained for any agricultural commodity under authority of

this Act or otherwise below a price which will reflect to producers of agricultural commodities the higher of the following prices, as determined and published by the Secretary of Agriculture—

(1) The parity price for such commodity (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials) or, in case a comparable price has been determined for such commodity under and in accordance with the provisions of section 3 (b) of the Emergency Price Control Act of 1942, such comparable price (adjusted in the same manner), or

(2) The highest price received by such producers for such commodity between January 1, 1942, and September 15, 1942 (adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials), or, if the market for such commodity was inactive during the latter half of such period, a price for the commodity determined by the Secretary of Agriculture to be in line with the prices, during such period, of other agricultural commodities produced for the same general use;

and no maximum price shall be established or maintained under authority of this Act or otherwise for any commodity processed or manufactured in whole or substantial part from any agricultural commodity, below a price which will reflect to the producers of such agricultural commodity a price therefor equal to the higher of the prices specified in clauses (1) and (2) of this section: *Provided,* That the President may, without regard to the limitation contained in clause (2), adjust any such maximum price to the extent that he finds necessary to correct gross inequities; but nothing in this section shall be construed to permit the establishment in any case of a maximum price below a price which will reflect to the producers of any agricultural commodity the price therefor specified in clause (1) of this section: *Provided further,* That modifications shall be made in maximum prices established for any agricultural com-

modity and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, under regulations to be prescribed by the President, in any case where it appears that such modification is necessary to increase the production of such commodity for war purposes, or where by reason of increased labor or other costs to the producers of such agricultural commodity incurred since January 1, 1941, the maximum prices so established will not reflect such increased costs: *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing: *Provided further*, That in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided for by this Act, adequate weighting shall be given to farm labor.

SEC. 4. No action shall be taken under authority of this Act with respect to wages or salaries (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act, or (2) for the purpose of reducing the wages or salaries for any particular work below the highest wages or salaries paid therefor between January 1, 1942, and September 15, 1942: *Provided*, That the President may, without regard to the limitation contained in clause (2), adjust wages or salaries to the extent that he finds necessary in any case to correct gross inequities and also aid in the effective prosecution of the war.

SEC. 5. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of $5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work week.

SEC. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe.

SEC. 7. (a) Section 1 (b) of the Emergency Price Control Act of 1942 is hereby amended by striking out "June 30, 1943" and substituting "June 30, 1944".

(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act.

SEC. 8. (a) The Commodity Credit Corporation is authorized and directed to make available upon any crop of the commodities cotton, corn, wheat, rice, tobacco, and peanuts harvested after December 31, 1941, and before

the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, if producers have not disapproved marketing quotas for such commodity for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:

(1) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 90 per centum of the parity price for the commodity as of the beginning of the marketing year;

(2) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (1) above;

(3) To noncooperators (except noncooperators outside the commercial corn-producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (1) above and only on so much of the commodity as would be subject to penalty if marketed.

(b) All provisions of law applicable with respect to loans under the Agricultural Adjustment Act of 1938, as amended, shall, insofar as they are not inconsistent with the provisions of this section, be applicable with respect to loans made under this section.

(c) In the case of any commodity with respect to which loans may be made at the rate provided in paragraph (1) of subsection (a), the President may fix the loan rate at any rate not less than the loan rate otherwise provided by law if he determines that the loan rate so fixed is necessary to prevent an increase in the cost of feed for livestock and poultry and to aid in the effective prosecution of the war.

SEC. 9. (a) Section 4 (a) of the Act entitled "An Act to extend the life and increase the credit resources of the Commodity Credit Corporation, and for other purposes", approved July 1, 1941 (U. S. C., 1940 edition, Supp. I, title 15, sec. 713a-8), is amended—

(1) By inserting after the words "so as to support" a comma and the following: "during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated,".

(2) By striking out "85 per centum" and inserting in lieu thereof "90 per centum".

(3) By inserting after the word "tobacco" a comma and the word "peanuts".

(b) The amendments made by this section shall, irrespective of whether or not there is any further public announcement under such section 4 (a), be applicable with respect to any commodity with respect to which a public announcement has heretofore been made under such section 4 (a).

SEC. 10. When used in this Act, the terms "wages" and "salaries" shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (excluding insurance and pension benefits in a reasonable amount to be determined by the President); but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers to their employees.

SEC. 11. Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

Approved, October 2, 1942.

Pertinent part of Executive Order No. 9250, October 3, 1942, 7 F. R. 7871.

Title IV:

"1. The prices of agricultural commodities and of commodities manufactured or processed in whole or substantial part from any agricultural commodity shall be stabilized, so far as practicable, on the basis of levels which existed on September 15, 1942, and in compliance with the act of October 2, 1942.

2. In establishing, maintaining or adjusting maximum prices for agricultural commodities or for commodities processed or manufactured in whole or in substantial part from any agricultural commodity, appropriate deductions shall be made from parity price or comparable price for payments made under the Soil Conservation and Domestic Allotment Act, as amended, parity payments made under the Agricultural Adjustment Act of 1938, as amended, and governmental subsidies.

3. Subject to the directives on policy of the director, the price of agricultural commodities shall be established or maintained or adjusted jointly by the Secretary of Agriculture and the Price Administrator; and any disagreement between them shall be resolved by the director. The price of any commodity manufactured or processed in whole or in substantial part from an agricultural commodity shall be established or maintained or adjusted by the Price Administrator, in the same administrative manner provided for under the Emergency Price Control Act of 1942.

4. The provisions of Section 3 (a) and 3(c) of the Emergency Price Control Act of 1942 are hereby suspended to the extent that such provisions are inconsistent with any or all prices established under this order for agricultural commodities, or commodities manufactured or processed in whole or in substantial part from an agricultural commodity.

Title V:

1. The Price Administrator in fixing, reducing, or increasing prices, shall determine price ceilings in such a manner that profits are prevented which in his judgment are unreasonable or exorbitant."

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,
Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

REPLY BRIEF FOR APPELLANTS.

HAROLD SIMANDL,
Attorney for Appellants;

ARTHUR T. VANDERBILT,
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CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,
Appellee.

On Appeal from the District Court of the United States for the District of New Jersey.

REPLY BRIEF FOR APPELLANTS.

I.

Appellee devotes a considerable portion of his brief to the proposition that the provisions of Section 204(d) in effect constitute a statutory generalization of the principles involved in the doctrine of exhaustion of administrative remedies. It is argued, therefore, that wholly aside from the provisions of Section 204(d), the lower court properly dismissed the complaint. This argument is not sound. Section 204(d) does not generalize the doctrine of exhaustion of administrative remedies because that doctrine holds that if a party has an adequate remedy before the administrative branch he must exhaust that remedy before seeking judicial review in the courts. However, that doctrine likewise recognizes that if a party is daily losing his prop-

erty as a result of the act, regulation or order complained of, and there is no right to a stay of the operation of the act, regulation or order complained of, a court of equity has and should exercise its jurisdiction to prevent irreparable damage pending judicial review. (See cases cited, pp. 12-13, appellants' main brief). Furthermore, we have demonstrated in our main brief (p. 34) that where a statute denies an injunction to a public utility pending review of the fairness of a rate order the statute is unconstitutional as denying due process of law. It follows that when a person's property is being daily confiscated he has no adequate remedy unless he can get a stay pending review of the validity of the act, order or regulation complained of.

Appellee argues (Brief, p. 47) that the principle applied in the public utility cases and other types of cases where a stay is required as a protection against excessive or cumulative penalties is not applicable to the present act. Appellee asserts that this rule was developed in the cases where the only means of obtaining judicial review was by committing a violation and awaiting prosecution. He asserts that is not the situation in the present act. This argument is likewise untenable for two obvious reasons. In the first place, even though the origin of the rule as asserted by appellee may be assumed, its application has not been limited to cases where the only remedy was to violate an order and await prosecution. (See cases in our main brief, pp. 13, 33, 34). In the second place, there is no adequate remedy under the act open to appellants. The inadequacy of the remedy has already been demonstrated, but additional reasons will be set forth later herein.

In the cases relied upon by appellee for the proposition that a court of equity has no jurisdiction until the party exhausts his administrative remedies, it appears (1) that there was no danger of irreparable injury, or (2) that there

was at the time still open to the party an administrative remedy which he could pursue to challenge the validity of the act, regulation or order complained of.

In our case (1) the danger of irreparable damage is imminent and great (in fact, such damage is occurring daily); and (2) there is no administrative remedy open to appellants whereby they can challenge the validity of the act, order or regulation complained of. The cases relied upon by appellee therefore are inapplicable here.

Notwithstanding the assertion in appellee's brief that a federal district court has no jurisdiction of a complaint seeking relief against a challenged act or regulation where there is an administrative remedy, this court recognized the jurisdiction of a federal district court to entertain a complaint to review an order of the Bituminous Coal Commission where the act provided that the review of the Commission's order in the Circuit Court of Appeals or the Court of Appeals for the District of Columbia was exclusive. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56.

The attempted distinction of *Ex parte Young*, 209 U. S. 123 (1907), and cases following the rule therein laid down is likewise without merit. If, as is alleged in the complaint herein, packers refuse to slaughter because they must lose on each head of cattle slaughtered, it is clear that appellants' businesses are being confiscated daily. Except for the discrimination in the integrated business they would be able to obtain meat for distribution to their trade. As a result solely of the discriminatory nature of the Act and the regulations promulgated thereunder, they daily suffer losses because of their inability to obtain meat for distribution. This is as much confiscation as is an arbitrary and discriminatory rate under the utility cases already referred to.

The argument on page 42 of appellants' brief that it is not uncommon for final injunctions against a governmental entity to be stayed or postponed for very long periods cannot aid appellee. On the contrary, the cases cited by appellee reinforce appellants' argument because they necessarily recognize the court's judicial power to control its own decrees.

II.

In appellee's brief it is asserted that appellants may attack the validity of the Act as a defense to the criminal indictments, but cannot attack the validity of the regulations. At the argument, in response to questions from the court, this position was reiterated. In fact, it was enlarged upon by the assertion that no act of the Administrator could be challenged except by a protest to the Administrator under Section 203, and by an appeal to the Emergency Court of Appeals under Section 204 from denial of the protest.

This argument, as we understand it from appellee's brief, as well as from the statement made at the argument, is predicated upon the premise that the Act provides appellants with an adequate administrative remedy. Appellants have demonstrated that they do not have an adequate remedy under the Act. However, additional considerations will emphasize this lack of an adequate remedy. In fact, they will emphasize that appellants have no remedy with respect to the regulations under the construction given to the Act by the court below and by the appellee.

It must be remembered that appellants assert in the complaint that the Act, in its operation upon them is discriminatory and confiscatory, and as a result they are being deprived of their property without due process of law.

A sufficient factual basis is set forth in the complaint to permit evidence to be introduced to establish these allegations, and the facts need not be set forth herein. It is appellants' complaint that this non action of the Administrator causes the confiscation which daily deprives them of their property. It is their contention now reiterated that this non action is not the subject of a protest and subsequent review. This, it is submitted, is clear from an examination of Sections 203 and 204 of the Act. Section 203 provides that any person subject to any provision of a regulation issued by the Administrator under Section 2 may file a protest with the Administrator, setting forth objections to any provision of the regulation. If the protest is denied in whole or in part the party may then under Section 204 file a complaint with the Emergency Court of Appeals.

Section 204(a) provides that no objection to such regulation and no evidence in support of any objection shall be considered by the Emergency Court of Appeals unless such objection shall have been set forth in the protest to the Administrator. It is significant that under Section 204(a) the words, "regulation, order or price schedule", appear five times. Furthermore, this section specifically provides that:

> "Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding".

The exclusive jurisdiction vested in the Emergency Court of Appeals, therefore, is to set aside such regulation, etc. Nowhere is the court given jurisdiction, either exclusive or nonexclusive, to set aside any provision of the Act.

Even if it be admitted, which appellants do not, that there is merit in appellee's contention that the Emergency Court of Appeals can pass upon the validity of the Act in reviewing regulations promulgated by the Administrator, it is clear that such a review would have to be limited to Section 2 under which the regulation is promulgated. By no reasonable interpretation of the Act can it be said that the Emergency Court in reviewing a regulation under Section 2, could pass upon the validity of Section 3 of the Act. Furthermore, the section of the Act just above quoted limits the jurisdiction of the court to set aside the regulation and makes no provision for setting aside the Act by the Emergency Court.

The significance of the language of Section 204(a) becomes apparent in the light of the language of (b) that "the effectiveness of a judgment of the court enjoining or setting aside in whole or in part any regulation, order, etc." and in the light of the language of (c) that "the court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act". The jurisdiction conferred on the Emergency Court by the Act (Sec. 204(a)) is solely "exclusive jurisdiction to set aside such regulation order, etc."

In view of the foregoing provisions it is clear that the construction placed upon Section 204(d) by the lower court deprives appellants of any remedy whatsoever to review the Act and particularly Section 3 of the Act as it affects appellants as a result of the regulations promulgated under Section 2. This construction of the Section, it is submitted, for the reasons fully discussed in our main brief, renders it unconstitutional.

It is abundantly clear from the language of Section 204(d) that it purports to deny all courts, except as provided in Section 204 of all jurisdiction and power to "stay,

restrain, enjoin or set aside in whole, or in part, any provision of this Act authorizing the issuance of such regulations or orders". Section 3, challenged by appellants, does not authorize the issuance of any regulations. On the contrary it prevents the Administrator from issuing a regulation except upon certain conditions, and apparently those conditions specified have either not yet occurred, or if they have occurred the Administrator has not acted with respect thereto.

It therefore follows that there is nothing in the Act to prevent the lower court from setting aside Section 3 if it is unconstitutional. If Section 3 is unconstitutional as alleged, then, and only then, can appellants demonstrate that the regulation issued under Section 2 unconstitutionally deprives them of their property.

Furthermore, it is difficult to understand appellee's statement at the argument that the criminal court could pass upon the validity of the Act but could not pass upon the validity of the regulations in view of the fact that the unconstitutionality of the Act as applied to appellants could not be demonstrated without reading the Act in the light of the effect of the regulations upon appellants. (See *O'Gorman & Young* v. *Hartford Fire Ins. Co.* 282 U. S. 251; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194. Since the effect of the regulations could not be challenged before the Administrator for the reasons herein set forth, it is submitted that they have the right to challenge them as a defense to the criminal indictments and also in this suit.

The complete injustice of the judgment of the court below and of the position taken by the appellee in this court is conclusively demonstrated by the proceedings before the Small Business Committee of the House of Representatives.

We have already referred to Administrator Brown's statement before that Committee in our original brief (p. 40).

After hearing testimony for many days, from February 8, 1943 to April 9, 1943 a meat packing report was submitted to the Committee and a resolution was adopted on March 10, 1943 at a joint session of the Senate Committee on Small Business and the House Committee on Small Business, both of which are set forth in full as an appendix hereto. Briefly the report asserts that the following conclusions, among others therein set forth, are justified from the evidence presented to the Committee:

(1) That the regulations fixing meat prices do not provide a "generally fair and equitable margin" as required by the Amendment of October 2, 1942 to the Price Control Act;

(2) That the packing industry consists of a few very large concerns and of hundreds of other smaller concerns;

(3) That from twenty to forty per cent of the industry would be unable to continue in business at present O. P. A. prices and present live stock costs;

(4) That a continuance of the present price "squeeze" on the packers may well force as much as one-third or more of the continuing concerns of the country out of business;

(5) That the loss of typical packers ranges from 57¢ to $3.75 per head slaughtered;

(6) That the record before the Committee contains no satisfactory explanation of the long-standing failure of the O. P. A. to accord to meat processors a fair and equitable margin required by the Price Control Act.

These findings were made at or about the same time as the Administrator decided *In the Matter of Kaufman Beef*

Company, et al, (referred to at page 66 of Appellee's brief) wherein the Administrator found that "removal of inequalities in maximum prices has restored normal competitive relationships among purchasers in the live cattle markets".

In the light of the testimony before the Smal' Business Committee summarized in the report appended hereto, the decision of the Administrator in the case referred to demonstrates the utter inadequacy and futility of any remedy before the Administrator.

The right to file a petition for amendment of the regulations with the Administrator (see footnote, page 13, of Appellee's brief) affords appellants no adequate remedy because (1) a denial of the petition is not reviewable under the Act (O. P. A. Revised Procedural Regulations 1, Section 1300.20, 7 F. R. 971); and (2) no stay can be granted to protect appellants against irreparable damage while the application is pending.

Conclusion.

For the reasons herein set forth as well as the reasons set forth in our main brief, it is submitted that the judgment in the lower court should be reversed.

Respectfully submitted,

HAROLD SIMANDL,
Attorney for Appellants;

ARTHUR T. VANDERBILT,
Counsel for Appellants.

On the Brief:

G. DIXON SPEAKMAN,
HERBERT E. ARMSTRONG,
GEORGE A. BROWN.

Appendix.

(From hearings before the Select Committee to conduct a study and investigation of the National Defense Program in relation to small business in the United States House of Representatives, Seventy-eighth Congress, First Session on H. Res. 18, April 8 and 9, 1943, Part 5 (Unrevised) pages 257-260).

MEAT PACKING REPORT, FEBRUARY 26, 1943.

It is essential to the successful prosecution of the war that the Nation have a maximum production of meat animals and meat products in order that the needs of our armed forces, of the civilian population, and of our allies may be met. Shortages of meat will adversely affect morale and substantial and continued shortages may actually interfere with the conduct of the war. The preparation for consumption of the increased production of livestock is dependent upon full utilization of the slaughtering and dressing facilities of the packers and the plants of processors of meat products. The packing industry consists of a few very large concerns and of hundreds of smaller concerns.

The committee has conducted hearings to determine the causes of the present shortage of meat and the accompanying black market. Witnesses representing meat packers and processors, the Department of Agriculture, the Office of Price Administration, and livestock producers were heard. On basis of the testimony of these witnesses, the following conclusions are justified:

1. The natural shortage of meat for civilian consumption which has inevitably resulted from the large demands of our armed forces has been aggravated by a price "squeeze" to which the packers have been subjected under the wholesale ceiling prices established by the Office of Price Administration. Under these ceiling prices the packers are said, for example, to be losing from $2 to $4 per hog slaughtered.

2. The shortage of meat has also been aggravated by a quota system imposed by the Office of Price Administration under which quotas for civilian sales are granted only to slaughterers and none are allowed to other processors. Under this quota system the nonslaughtering processors are dependent for supplies upon the willingness of slaughterers, in most cases the largest packers, to share their reduced civilian quotas with them.

3. A continuance of the present price "squeeze" on the packers may well force as much as one-third or more of the packing concerns of the country to discontinue operations because of heavy losses.

4. The ceiling prices established by the Office of Price Administration apply on purchases by the Government and its armed forces. The maintenance by Government edict of below-cost prices on products which the packer must supply on compulsory government orders is un-American and cannot be too severely condemned.

5. The "squeeze" in prices on legitimate sales and the discriminatory quota system have resulted in the worst "black market" in meats in the history of the country. The "black market" is injurious in three ways: (1) It provides in the markets meat from animals which have not been adequately inspected, if inspected at all, and subjects the population to the risk of eating diseased meat; (2) "black market" prices are so much above the ceiling prices as to operate in a substantial way to defeat the purpose of legislation directed against inflation; and (3) it places a penalty on honest operation of packing plants and processing plants and places a premium on dishonesty because of the enormous profits which result from "black market" operations.

6. The Office of Price Administration and the Secretary of Agriculture have adequate legislative authority to correct the maladjustment and injustice now in the meat in-

dustry, but they have not worked in close cooperation and have differed on important questions of policy.

Restricted Operations of Packing Plants

The War Manpower Commission has recognized that meat packing is an essential industry. The Department of Agriculture has emphasized the need for all existing packing plants in order to slaughter and prepare for consumption the large production of livestock which is necessary and is being encouraged to meet the needs of the Armed Forces, the civilian population, and our allies. A very substantial part of these facilities are threatened, however, with the necessity of discontinuing operations growing out of the losses suffered under the price maintained by the Office of Price Administration. The present shortage in meat supplies is substantially explained by the small volume of operations of many packers. The losses of the companies increase with the volume of business and in order to minimize losses while continuing to operate, many plants have reduced their slaughter to a minimum. One concern, which presented a witness to the committee, is slaughtering only 900 head of hogs per week, whereas its normal volume is 3,600 head. A representative of the Amalgamated Meat Cutters and Butchers Union, A. F. of L., testified that because of the bad price situation the packers have reduced employment to only 28 to 30 hours a week. The members are receiving only guaranteed minimum wages and are threatening a "holiday," not against the packers, but against the price "squeeze" suffered by their employers.

The Price Squeeze

The Price Control Act of 1942 was amended October 2, 1942, to provide: "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing."

This amendment has not been heeded by the Office of Price Administration. The evidence before the committee,

including specifically that of representatives of the Office of Price Administration charged with the fixing and administration of meat prices, is convincing that the present prices do not provide a "generally fair and equitable margin." The chief of the section charged with the establishment of meat prices "guessed" that from 20 to 40 percent of the industry would be unable to continue in business at present Office of Price Administration prices and present livestock costs. The pork prices now outstanding were established on basis of the cost to the packers of approximately $13.50 per hundred pounds, Chicago average. The prices of hogs at the time of hearing in mid-February was $15.75. At this cost for hogs there is no "margin" for packers. They are, in fact, losing from $2 to $4 per head slaughtered. The situation on beef is not so severe; but here also there is a failure by the Office of Price Administration to provide, as required by the Price Control Act, a fair margin. The beef prices now maintained by the Office of Price Administration are approximately $1 per hundred pounds below the normal margin and the loss of typical packers ranges from 57 cents to $3.75 per head slaughtered, depending on quality.

CONCLUSION

The record before the committee contains no satisfactory explanation of the long-standing failure of the Office of Price Administration to accord to meat processors the fair and equitable margin required by the Price Control Act. Unless the packers are assured such fair margins, the Nation is faced with increasing meat shortages and the possible loss of as much as one-third of the present plants. This problem has been allowed by the Office of Price Administration and the Secretary of Agriculture to remain unsolved although they have been aware of it for several months. There is as between the Office of Price Administration and the Secretary a regrettable lack of joint effort. The committee has made clear to the officials concerned that the present situation cannot be permitted to continue and that an immediate correction of the situation is necessary in the public interest.

RESOLUTION ADOPTED AT A JOINT SESSION OF THE SENATE COMMITTEE ON SMALL BUSINESS AND THE HOUSE COMMITTEE ON SMALL BUSINESS, MARCH 10, 1943

(As reported by a Subcommittee composed of Senators Stewart and Wherry and Representatives Patman and Ploeser)

Whereas the small meat industry, including small packers, processors, wholesalers and retailers, has complained for several months to the Small Business Committees of the House and Senate against various practices imposed upon them by the Office of Price Administration and the Department of Agriculture, which threaten to drive them out of business and disrupt the distribution of meat and meat products for essential civilian needs; and

Whereas the Small Business Committees of the House and Senate have held both joint and individual hearings and have otherwise investigated conditions in the meat industry and said committees as a result of said investigations and hearings are persuaded that the small meat industry, including the small packers, processors, wholesalers, and retailers, is in danger of being destroyed; and

Whereas the break-down in the civilian supply of meat and meat products has resulted from the failure of the Office of Price Administration and the Department of Agriculture to conform with the express mandate of the Congress in the Second Emergency Price Control Act of October 2, 1942, that "in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing"; and

Whereas the break-down in the civilian supply of meat and meat products has further resulted from the failure of the Office of Price Administration and the Department of Agriculture properly to guide the flow of meat and meat products through the orderly channels of distribution; and

Whereas Public Law 421, Seventy-seventh Congress, known as the Price Control Act, title I, section 2 (a), pro-

vides that the Administrator shall "appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be," and the said section further provides that "The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classification, differentiations, and adjustments therein"; and

Whereas the Price Administrator has not exercised said discretionary powers and has not set up such an advisory committee, as suggested in the act, and has not regularly consulted all segments of the meat industry—namely, the large and small slaughterer and nonslaughterer in the packing industry, the large and small processor; the wholesaler, retailer, and consumer; all of which has contributed to the break-down of normal distribution and the destruction of small businesses throughout the country: Now, therefore, be it

Resolved by the Senate and House Committees on Small Business, that—

1. The Office of Price Administration immediately establish fair and equitable margins between the price of livestock and the price ceilings set on sales of meat and meat products for all processors, packers, wholesalers, and retailers;

2. The Department of Agriculture and the Office of Price Administration immediately establish quotas for nonslaughtering packers as well as slaughtering packers and allocate adequate supplies to the small wholesalers and retailers in all areas of the country, so that when meat rationing is put into effect adequate initial inventories will be held by such packers, processors, wholesalers, and retailers; and

3. The Administrator of the Office of Price Administration immediately proceed to discharge his discretionary

powers under the Act (Public Law 421, 77th Cong., ch. 26, 2d sess.) by immediately establishing a meat industry advisory committee that will include in its membership equal representation for the large and small slaughterers and nonslaughterers in the packing industry, the large and small processors, the wholesaler, the retailer, and the consumer, which advisory committee shall be regularly consulted by the Office of Price Administration and the Department of Agriculture with regard to all new regulations, amendments to existing regulations, directives, orders, or any promulgations with respect to the form thereof and the classifications, and adjustments therein as the same affect the meat industry; and

4. Copies of this resolution be immediately forwarded to the Office of Price Administration and the Department of Agriculture and that this committee be advised promptly by the Price Administrator and Secretary of Agriculture of action taken.

In the Supreme Court of the United States

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL, LEO OSHINSKI, AND ENKAY PACKING COMPANY, INC., APPELLANTS

v.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY, APPELLEE

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM [1]

STATEMENT OF THE CASE

This suit was brought by appellants to enjoin the appellee from prosecuting indictments charging violations of the Emergency Price Control Act of 1942 to which they, as defendants, had interposed demurrers and motions to quash, on the ground that the Act and regulation issued under it establishing wholesale meat prices were unconsti-

[1] At the request of the Clerk of the Supreme Court, the appellee is filing this statement with this Court at this time instead of filing it with the Clerk of the Court below.

tutional. Appellee filed a motion to dismiss the complaint for want of jurisdiction on the grounds (1) that Section 204 (d) of the Emergency Price Control Act withdrew jurisdiction from all courts to enjoin enforcement of the Act, and (2) that *Cline* v. *Frank Dairy Co.*, 274 U. S. 445, conclusively established that no equitable power exists in any court to grant a stay of pending criminal proceedings upon the ground that the statute on which they were rested was unconstitutional, because the defendants had an adequate remedy at law in the pending criminal cases, insofar as their right to attack the validity of the statute was concerned.

At the argument it was also pointed out to the court below that the claims as to unconstitutionality of the Price Control Act, which the plaintiffs in the equity suit were there asserting, did not even reach certain counts contained in many of the pending indictments charging them with violations of the record-keeping provisions contained in Section 202 of the Act, (50 U. S. C. App. Sec. 922). As this section was severable from the provisions attacked in the equity case as unconstitutional, the counts based thereon were not affected by the alleged unconstitutionality of those provisions in any event (*Kay* v. *United States*, 303 U. S. 1, 8). Counsel for appellee also conceded in the argument that all questions as to the validity of the Price Control Act were

open to the apellants as defendants in the criminal cases in accordance with the settled policy pursued by the United States in its enforcement of that statute in all of the criminal cases which have arisen since its enactment.

The court below granted the motion to dismiss for want of jurisdiction without hearing argument on the appellants' motion for injunction, upon the ground that Section 204 (d) withdrew jurisdiction to grant the relief sought. In so doing, it rejected the appellants' claim that this section was unconstitutional.

Section 204 (d) of the Emergency Price Control Act of 1942 reads as follows:

> Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall

> have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

In dismissing the complaint for want of jurisdiction, the lower court construed the last sentence of this section as not preventing the appellants from challenging the validity of the Act, as distinguished from the validity of the regulations issued under it, in any enforcement proceeding brought by the United States or by the Administrator, which is the settled construction which has been adopted by the Administrator and the United States in the civil and criminal enforcement of the Act, ever since its inception.[2]

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[2] Every federal court which has so far had occasion to pass upon the validity of Section 204 (d) has sustained it. *Hatter* v. *Henderson*, Civil Action No. 306, S. D. Ala., So. Div.

The provision withdrawing jurisdiction to stay, restrain, enjoin, or set side any provision of the Act was construed as applying only to suits in which affirmative relief was sought against enforcement, such as the complaint in this case. The lower court thus did not reach the contention with respect to the lack of any equitable power to restrain the prosecution of the pending criminal cases in any event or the more narrow question raised by the failure of the complaint to attack the validity of the provisions of the Act upon which many of the counts in the pending indictments were grounded.

THE APPEAL PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION

The validity of the substantive provisions of the Emergency Price Control Act and the applicable regulations thereunder, which appellants seek to raise in this proceeding, is not squarely in issue. Those questions may be raised in the pending criminal action in which appellants are defendants, except to the extent that certain questions are reserved by Section 204 (d) of the Act for administrative determination and review in the emergency court of appeals. To the extent that appellants may seek to challenge the validity of this allocation of functions under Section 204

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unreported, decided July 28, 1942; *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Dieffenbaugh* v. *Cook*, 47 F. Supp. 645 (N. D. Ind., 1942).

(d), the challenge may properly be presented in the criminal action.[3] Indeed, in several criminal cases brought under the Act a similar contention has been made and passed upon; and it may be observed that the validity of the jurisdictional provision has been sustained (*United States* v. *Thomas Stores Inc.*, No. 7432, D. Minn., per Nordbye J., found in Pike and Fischer, Administrative Law, Sec. 85b.21–4; *United States* v. *Slobodkin*, No. 16058, D. Mass., per Wyzanski J., *idem*, Sec. 85b.21–1). Moreover, these rulings can, of course, be reviewed in the ordinary course of appellate procedure.

In the present case the validity of Section 204 (d) is presented in very narrow compass. The section provides that no court shall have jurisdiction to enjoin the enforcement of any provision of the Act or regulations thereunder. In its present application this provision simply confirms and generalizes sound equity practice. Federal courts will not enjoin the progress of criminal proceedings pending in either state or federal courts. (See *In re Sawyer*, 124 U. S. 200; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451–452; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Campbell* v. *Medalie*, 5 F. Supp. 156 (S. D. N. Y.).) The rule is par-

[3] We agree with the construction by Judge Maris that the validity of the statute itself may be questioned in the district courts, while the validity of regulations may be questioned only in the emergency court of appeals, which also has power to consider the validity of the Act.

ticularly appropriate where the very issues which the bill in equity seeks to raise are in issue in the criminal case. We submit, furthermore, that there is no present occasion to consider the effect of threats of multiple prosecutions; the possibility thereof, as asserted in the bill of complaint, is too remote to warrant injunctive relief (Cf. *Watson* v. *Buck*, 313 U. S. 387, 400).

It is thus unnecessary, it is submitted, to consider the extent to which in other circumstances Congress may withdraw from the lower federal courts the power to issue injunctive or restraining orders. It may be observed, however, that in a number of cases this Court has recognized this power in a variety of circumstances (*Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323 (1938); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41 (1938); *Smallwood* v. *Gallardo*, 275 U. S. 56 (1927); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226 (1922).

Finally, we wish to point out that the complaint alleges "that many of the indictments" include a count or counts charging the appellants with wilfully failing to make and preserve complete and accurate records of the sales made by them. We do not understand that appellants challenge the validity of these requirements by themselves. This feature of the bill of complaint serves to emphasize the impropriety of attempting in a court of equity to control the prosecution of a criminal case involving several provisions of the Act which

may be deemed separable by the court in which the criminal case is being tried.

Accordingly, we submit that the appeal should be dismissed for the want of a substantial constitutional question or that the judgment of the court below be affirmed without argument.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APR. 17, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 934

CLEM LOCKERTY, ANTHONY CARUSO, ET AL.,
APPELLANTS

v.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court has not yet been reported.

JURISDICTION

The judgment of the district court was entered on April 2, 1943. Petition for appeal was filed and appeal was allowed on April 9, 1943. Probable jurisdiction was noted on April 19, 1943. The jurisdiction of this Court rests on the Act of August 24, 1937, 50 Stat. 754, 28 U. S. C., sec. 380 (a).

524631—43——2

QUESTIONS PRESENTED

1. Whether the jurisdiction of the district court to restrain the enforcement of criminal proceedings for violation of price regulations under the Emergency Price Control Act was validly withdrawn by Section 204 (d) of that Act.

2. Whether, apart from the express provisions of Section 204 (d), the case was within the equity jurisdiction of the district court.

STATUTES AND REGULATIONS INVOLVED

The statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C., Appendix 901, copies of which will be furnished to the Court. Maximum Price Regulation 169 and Revised Maximum Price Regulation 169 will be found, respectively, in 7 Federal Register 4653 and 10381.

STATEMENT

This is a direct appeal from a judgment of the District Court of the United States for the District of New Jersey, dismissing a complaint for injunction to restrain the United States Attorney from prosecuting criminal actions now pending against appellants in that district, and future actions asserted to be threatened, for violation of the Emergency Price Control Act and Maximum Price Regulation 169 as originally issued and as revised. A statutory District Court of three judges convened to pass upon the complaint sustained a

motion by the defendant United States Attorney, appellee herein, to dismiss the suit.

The amended complaint was filed on March 26, 1943 (R. 3, 8–30). It alleged that plaintiffs (appellants herein) own well-established and valuable businesses as wholesale meat merchants in the northern part of the state of New Jersey, their business consisting of the purchase of meat from meat packers and the sale thereof at wholesale to retail dealers (R. 9); that the prices at which wholesale meat dealers such as plaintiffs are able to distribute their products to the retailer, and through him finally to the consumer, depend upon cost factors present at various stages in the productive and distributive processes of the meat industry as a whole, the available supply being controlled by the volume of slaughter of the packers, which in turn depends upon the packers' expectation of profit (R. 9–10); that the Price Administrator, in issuing Maximum Price Regulation No. 169 and Revised Maximum Price Regulation No. 169, setting maximum prices on sales of wholesale cuts of beef, had failed to give due consideration to the "setup" of the meat industry as a whole (R. 17); that the regulations disturbed the flow of meat supplies from the packers because uncontrolled livestock prices make it unprofitable for packers to slaughter livestock; and that the regulations threatened to put plaintiffs out of business by shutting off their supplies of meat (R. 17–18).

It was further alleged that plaintiffs' business had been made the subject of extensive investigation by representatives of the Administrator, and that criminal informations and indictments, containing multiple counts, had been filed against plaintiffs charging them with violations of the Act and the regulations (R 19–20); that each count of the said indictments, as shown in a typical count set forth in the complaint, was based upon an alleged single sale of meat by each of the plaintiffs to one of its retail customers, and that in many of the indictments an additional count was contained charging record-keeping violations (R. 20–21); that under the provisions of section 205 (b) of the Act, and in view of the nature of plaintiffs' business and the detailed and extensive character of the investigation made (and still being made) by representatives of the Administrator, plaintiffs were threatened with a multiplicity of criminal suits, which would result in irreparable injury to them (R. 22–23).

The complaint alleged further that the Act upon which the pending and allegedly threatened criminal prosecutions were based is unconstitutional on various grounds and, in particular, because the statutory plan of exclusive review is unconstitutional, plaintiffs thus being threatened with a deprivation of their procedural rights under the Constitution in the pending and allegedly

threatened criminal prosecutions (R. 26–28); that each of the plaintiffs had filed a motion to quash the indictments on the ground that the Act and the regulations were unconstitutional (R. 26); and that unless plaintiffs are granted the relief prayed for in their bill, they will be wholly without remedy against irreparable injury (R. 29).

The complaint prayed that the Court declare the Act, and particularly sections 204 (c) and 204 (d), unconstitutional, and that the defendant United States Attorney be restrained from proceeding with the pending criminal suits, from instituting any further criminal prosecutions against plaintiffs, and from interfering with plaintiffs' business in any manner under authority of the Act (R. 29–30).

On March 11, 1943, the Government filed its motion to dismiss the complaint on the grounds, *inter alia*, that the Court was without jurisdiction of the subject matter in view of the provisions of section 204 (d) of the Act, and that a court of equity ought not to exercise its jurisdiction to restrain pending criminal prosecutions (R. 6–7).

On March 29, 1943, the three-judge District Court rendered its opinion sustaining the motion to dismiss on the ground that section 204 (d) of the Act deprived the court of jurisdiction, and that this section is constitutional. The opinion was delivered by Judge Maris; a dissenting opinion was delivered by Judge Fake (R. 37–42).

SUMMARY OF ARGUMENT

I

1. The court below properly held that its jurisdiction to grant the injunctive relief sought had been withdrawn by the explicit provisions of Section 204 (d) of the Emergency Price Control Act. Those provisions are part of a coherent statutory procedure which is designed for protection against the premature interruption and variegated enforcement of wartime inflation control, and which at the same time affords to aggrieved persons an orderly avenue of administrative and judicial review. The validity of regulations and of the Act itself may be challenged in the Emergency Court of Appeals and on review in this Court; the record in such proceedings is formulated by protest or application for adjustment addressed to the Administrator. Other courts may consider the validity of the Act itself as a defense in enforcement proceedings, but may not consider the validity of regulations, nor may they entertain suits brought to enjoin the enforcement of the Act or regulations thereunder. No court, including the Emergency Court of Appeals, may grant stays or interlocutory injunctive orders restraining the operation of regulations. The necessity for such a procedural pattern is evident in the light of the special problem of effective control of inflation in wartime. Price inflation is cumulative and irremediable. If it is to be con-

trolled at all it must be controlled uniformly, without delay, and without interruption.

2. The withdrawal of jurisdiction from the district court to entertain a suit for injunctive relief against enforcement of the Act may be rested not only on the war powers of Congress but on its authority over the jurisdiction of the inferior federal courts. Familiar examples of such legislation are Section 3224 of the Revised Statutes and the Norris-LaGuardia Act. Here, however, Congress has not simply withdrawn such jurisdiction; it has distributed it by conferring it exclusively on the Emergency Court of Appeals, with review in this Court. In this respect the legislation is comparable to the typical procedure prescribed for the review of orders of federal administrative agencies. Under such statutes, of which the Federal Trade Commission Act may be taken as the prototype, the courts have declined to issue injunctions even without explicit withdrawal of that jurisdiction, and have required that resort be had to the exclusive forum provided by law. E. g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

3. Objection is made to certain features of the procedure which has been provided. Principally the attack is directed at the provisions which prohibit stays and interlocutory injunctive orders, for the purpose of maintaining continuity of price control pending completion of the statutory review

proceedings. Appellants, however, have not been injured by the stay provisions since they have not sought redress by application to the Administrator and the Emergency Court of Appeals. Cf. *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337. Moreover, a stay is not a matter of absolute right under the Constitution. See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10. In the present statute Congress has generalized what would undoubtedly have been proper judicial practice governing the issuance or denial of stays, since that practice gives special weight to the public interests affected. The principle that vital public interests will not be set at naught by the granting of interlocutory relief in the absence of overwhelming private need finds its most frequent application in cases involving property rights. See *Phillips* v. *Commissioner*, 283 U. S. 589, 595.

The decision in *Ex parte Young*, 209 U. S. 123, and the cases which have followed it, are not opposed to our position. In the first place, in holding that there was a right to a stay of penalties threatened by criminal prosecutions those cases emphasized the fact that the statutes under consideration provided no method of challenge save by defending in criminal actions, and where violations of the statute would subject the individual to oppressive penalties all effective avenues of redress were blocked. See *Wadley Southern Railway* v. *Georgia*, 235 U. S. 651, 662. In the

present Act orderly challenge may be made by administrative protest and judicial review. Moreover, for the most part the cases relied on by appellants involved the element of continuing confiscation in relation to public utility regulation. In the present case there is no constitutional right that regulation under the war powers shall yield a fair return to those regulated. Finally, it would be wholly incompatible with the functioning of the price control law to follow the practice pursued in public utility cases. The giving of a bond, for example, would not serve to protect against the evils of inflation.

It may be observed that in the case of revocation of licenses, not involved here, the statute requires a judicial order and makes provision for stays. Compare *Porter* v. *Investors Syndicate*, 286 U. S. 461; *id.*, 287 U. S. 346.

4. Objection is also made to that feature of the procedure which bars consideration of the validity of price regulations, as distinguished from the validity of the Act itself, in suits to enforce the Act, and which grants exclusive authority in that regard to the Emergency Court of Appeals. Apart from the fact that this statutory allocation of functions may be challenged in the criminal enforcement proceedings themselves, the objection is not well founded. The provision in question establishes the proper consequence of a failure to exhaust administrative remedies. Where there has been such failure the defense of

invalidity of the regulation may not be open even in criminal proceedings. *Bradley* v. *City of Richmond*, 227 U. S. 477; cf. *United States* v. *Corrick*, 298 U. S. 435.

The foregoing considerations are sufficient to dispose of appellants' contention that the procedural provisions are an invalid abridgment of the judicial power.

II

Even apart from the express statutory withdrawal of jurisdiction in the court below, the bill would not present a case within the equity jurisdiction of the court. An injunction will not be granted to restrain a pending criminal prosecution, particularly where the very procedural objections urged may be made matters of defense. Cf. *In re Sawyer*, 124 U. S. 200. With respect to the threats of future prosecutions, equitable intervention is likewise unjustified. There is no occasion for enjoining the imposition of penalties, however substantial, where the validity of the statute may be challenged through administrative and judicial remedies. As has been stated above, there are no features of that administrative and judicial procedure which render it invalid so as to dispense with recourse to it.

The present case illustrates with special force the inappropriateness of injunctive proceedings. The damage which appellants assert is not damage resulting from the specific maximum price regulation which they have violated and for the violation

of which prosecutions are pending, but it is damage asserted to result from a shortage of supplies caused by the imposition of price ceilings on appellants' suppliers, the packers, who are said thereby to have limited their purchases from livestock producers. Moreover, even if appellants were permitted to sell at prices in excess of those fixed for them as wholesalers, it does not follow that retail dealers would be in a position to purchase at the increased prices, in view of the ceilings on retail sales. It is evident that what appellants must seek, on their own showing, is a readjustment of price regulations as applied to a series of transactions involving others who are not parties to the proceeding and whose interests can most appropriately be considered in relation to that of appellants in the administrative proceedings made available by the Act.

ARGUMENT

I

THE COURT BELOW PROPERLY DISMISSED THE BILL IN RECOGNITION OF THE EXPRESS WITHDRAWAL OF ITS JURISDICTION EFFECTED BY SECTION 204 (d) OF THE EMERGENCY PRICE CONTROL ACT

A. THE STATUTORY PROCEDURE AND THE CONSIDERATIONS IMPELLING ITS ADOPTION

The jurisdiction of the court below to entertain this suit has been expressly withdrawn by act of Congress. The suit is one to enjoin enforcement of Maximum Price Regulation No. 169, as

originally issued and as revised pursuant to section 2 (a) of the Emergency Price Control Act. Sections 203 and 204 of the Emergency Price Control Act establish an exclusive statutory procedure for administrative reconsideration and judicial review of maximum price and rent regulations issued pursuant to section 2 of the Act. As the exclusive judicial forum under this statutory plan a new court of the United States, the Emergency Court of Appeals, is created by section 204 (c) of the Act. Its judgments are made reviewable by writ of certiorari in this Court. In order to preserve the exclusive purview thus reserved to the Emergency Court of Appeals and to this Court, section 204 (d) of the Act expressly withdraws competing jurisdiction from all other courts. An exclusive method has thus been provided in the Act whereby any person subject to a price or rent regulation, having first pursued the administrative remedies provided by the statute, may institute proceedings for injunctive relief from the regulation in the Emergency Court of Appeals, with final review by this Court.

Section 204 (d) further provides that no court outside the exclusive statutory forum shall have jurisdiction or power "to stay, restrain, enjoin, or set aside" any price or rent regulation or any provision of the act authorizing the issuance of such regulations, or "to restrain or enjoin the enforcement" of such regulations.

Thus, in seeking to have the court below enjoin the enforcement of Maximum Price Regulation No. 169 appellants were asking that the court assume to exercise a jurisdiction which Congress has expressly denied to it. The court properly refused this invitation, and rejected appellants' contention that section 204 (d), in thus barring the present suit, is unconstitutional. It is submitted that the decision reached below was correct.

The statute and implementing regulations which have been issued pursuant to it [1] afford to aggrieved persons full opportunities for administrative and judicial relief. In addition to the remedy expressly provided in the statute authorizing "protests" against a regulation, addressed to the Administrator with judicial review in the Emergency Court of Appeals and this Court (Sections 203, 204), the Administrator has also established procedures for the granting of special "adjustments" as authorized by the Act (Sections 2 (c), 201 (d)), and for the granting of petitions for amendment of regulations.[2] A denial by the Administrator of a protest or an application for adjustment is reviewable by the Emergency Court of Appeals upon filing of a complaint in that Court

[1] Revised Procedural Regulation No. 1, 7 F. R. 8961; see also Section 1364.410 of Maximum Price Regulation No. 169.

[2] The petition for amendment is an additional remedy afforded by the Administrator and not required by the Act. Such a petition is addressed to the Administrator's "legislative" discretion.

pursuant to the provisions of Section 204 (a) of the Act. Final review may thereafter be had in this Court by writ of certiorari (Section 204 (d)). The Emergency Court of Appeals is vested with full authority to set aside any regulation or order which is shown to be "not in accordance with law, or * * * arbitrary or capricious". (Section 204 (b)). It also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself.[3] Appellants' contention that the Emergency Court of Appeals may pass only upon regulations, and not upon the Act itself, is incorrect. The Emergency Court of Appeals exercises the judicial power of the United States in reviewing the Administrator's determinations. Except for the restrictions as to issuance of interlocutory orders, it exercises the full powers of a district court of the United States, with respect to the jurisdiction conferred by the Act (Section 204 (c)).

Directly in issue in the present case is the provision of Section 204 (d) forbidding any court other than the Emergency Court to enjoin the enforcement of price control orders. Indirectly involved, if it is thought necessary to consider the

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[3] The report of the Senate Banking and Currency Committee, favorably reporting these provisions, stated (77th Cong., 1st Sess., S. Rep. 931, p. 25): "Of course, the courts in which criminal or civil enforcement proceedings are brought *have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.*" (Italics supplied.)

provisions for administrative and judicial review, are the provisions that the validity of price regulations (as distinguished from the statute) shall not be considered in suits to enforce the Act (section 204 (d)), that no interlocutory relief shall be had in the Emergency Court (section 204 (c)), and that regulations set aside by that court shall remain in force pending review by this Court (section 204 (b)).

These provisions are parts of a unified statutory plan. They are designed for the protection of the nation against the perils which inhere in delay, premature interruption, or non-uniform application of inflationary controls in wartime. Before considering the precedents which support their validity, we shall recount briefly the considerations which impelled their enactment and which demonstrate their function in the control of wartime inflation.

The need for continuity of control.—There will be no challenge, we are confident, of the judgment embodied in the Emergency Price Control Act that effective control of price inflation is a matter of the most urgent necessity for a nation at war today.[4] Effective control is difficult in part because the incidents of price inflation are as manifold and as widespread as the business transactions which take place each day in the economic

[4] See Message of the President, July 30, 1941, 87 Cong. Rec. 6457, H. Rep. 1409, 77th Cong., 1st Sess.

life of a large industrial nation. The chief difficulty arises, however, from the cumulative and irremediable character of price inflation. An inflationary incident is virtually impossible to undo, because its consequences are rapid and pervasive. The only effective way to control inflation with respect to particular commodities is to control it uniformly, without delay, and without interruption.

If preliminary or final injunctions or other paralyzing orders interfering with the present controls could be secured in various judicial districts throughout the country, and if premature relief could be secured in the statutory forum, the purposes of the Emergency Price Control Act would be nullified. Persons or localities benefitting by such adjudications in the regularly established courts of the country would be freed from the obligation to comply with regulations while others still had to obey. Such inequality in the operation of the statute would naturally create a sense of injustice in the community, would militate against popular acceptance of the statute, and would make its proper enforcement more difficult. More than this, however, such uneven and haphazard operation of the statute would carry a threat of serious damage to the domestic economy. The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the areas in which higher

prices prevailed. Producers in lower-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities.

Similarly, premature orders in the statutory forum itself, suspending the effectiveness of regulations throughout the country in advance of a final decision on their validity, would defeat expeditious and fair methods of regulation. If a price regulation did not have to be obeyed during the period between its original promulgation and final judicial determination of its validity, many persons would find it more profitable to make the fullest use of the law's delays rather than to take advantage of the opportunities provided by the statute for a speedy decision. The consequences of any prolonged suspension of regulations might be disastrous and would be irrevocable.

It is evident, then, that control of price inflation in wartime, perhaps unlike other kinds of governmental regulatory action, cannot accomplish its purpose unless it is effective from the very outset and continues to be effective while normal administrative remedies are being applied and the fullest judicial consideration of the program is being completed. No bond or deposit in court could safeguard the incalculable values both public and private which are at stake when inflationary controls are challenged in wartime. No price

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can be placed upon military need and national morale. Congress recognized in this Act that the national safety demands continuity of price control until, in pursuance of an orderly course of proceedings, the decision of the highest court of the land has been had upon the questions of law involved.

The need for a simplified enforcement mechanism.—The need for simplified enforcement in aid of wartime price controls is apparent. Maximum price regulations affect millions of persons. Unless effective enforcement measures are available, a price control program cannot long proceed successfully. If, in every suit to enforce compliance with the regulations, the Government were under an obligation to present the mass of economic data which might be required to establish the validity of the regulation, and to meet the evidence and arguments which might be presented by each defendant, the already great difficulties of enforcement might well become insuperable. Congress in adopting the review provisions of this Act had before it the discouraging history of delay in the litigation of public utility rate cases. See Mr. Justice Brandeis, concurring; in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, at 84–88; Mr. Justice Black, dissenting, in *McCart* v. *Indianapolis Water Co.,* 302 U. S. 419, 435–436. The technical and complex economic questions involved in challenges to the validity of price regulations have accordingly been reserved

by Congress for consideration in orderly proceedings before a specially constituted tribunal which can act on a proper administrative record, can develop the essential expertise for a fair, well advised, and expeditious appraisal of the regulations, and can build up the necessary uniformity in standards of review. The Emergency Court of Appeals thus enjoys the advantage of a continuous and concentrated experience in disposing of these important controversies. It can render its decisions upon a comprehensively informed basis and with proper recognition of national aspects.

The need for administrative flexibility.—Thousands of persons are often affected by the establishment of a single price ceiling. Careful investigation prior to the issuance of a regulation will have brought the general economic considerations to the attention of the Administrator. No amount of preliminary economic survey, however, can bring to the attention of the Administrator all of the significant facts in the situation and all of the ways in which the regulation will affect the persons subject to it. The unique problems of particular business units can only be known if they bring their cases to the attention of the Administrator and advise him of the facts. Often there is no occasion for controversy between persons subject to a regulation and the Administrator, but merely the need for an opportunity to present significant and relevant facts to the Administrator. Precision in adjustment or modi-

fication of a regulation is only possible within the framework of the administrative processes. The agency which establishes the regulation is in the best position to make a thorough and complete reexamination of the considerations which led to the issuance of the regulation in its original form.

In contrast with the flexibility of the administrative remedy is initial judicial determination of the validity of a maximum price regulation. A court in passing upon the validity of a particular regulation would be limited to a finding that it is either valid or invalid. It could not make the adjustments or modifications appropriate for a particular case. If a maximum price of 10 cents per pound is judicially determined to be invalid, the result would not be that a maximum of 11 cents would be substituted; the seller would be free to sell at any price the traffic would bear. Instead of flexible but secure control of prices, the result would be absolute release of control for a period.

That the considerations outlined above dictated the adoption of these provisions by Congress is amply shown by the legislative history of the provisions, as set forth in the accompanying footnote.[5]

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[5] The following excerpts are from the report of the Senate Banking and Currency Committee, recommending adoption of the provisions (77th Cong., 1st Sess., S. Rep. No. 931, pp. 23, 24–25):

"* * * In keeping with the emergency character of the regulations and orders of the Administrator issued under section 2 of the bill, and to expedite action affecting the

The instant suit illustrates the needs which Congress had in view when it passed this Act. An important group of wholesale dealers in meat, a

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validity of such regulations or orders without overburdening the regular courts and judges, exclusive jurisdiction to determine the validity of any such regulation or order is vested in an Emergency Court of Appeals created under section 204 (c) of the bill, and upon review of judgments or orders of such Emergency Court, in the Supreme Court of the United States. * * *

"The Emergency Court of Appeals is given exclusive jurisdiction to set aside, in whole or in part, any regulation or order under section 2, to dismiss the complaint, or to remand the proceedings, and all the powers of a district court are conferred upon it with respect to this jurisdiction, except the power to issue interlocutory orders staying the effectiveness of any such regulation or order (p. 23).

* * * * * * *

"The bill contains provisions necessary to insure that price control administration will not be paralyzed by preliminary injunctions, interlocutory restraining orders, or stays. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court, are granted exclusive jurisdiction under section 204 (d) to determine the validity of any regulation or order issued under section 2 or of any price schedule effective under the provisions of section 206. If the judgment of the Emergency Court is to enjoin or set aside, in whole or in part, any such regulation or order, the effectiveness of such judgment is postponed under section 204 (b) until after 30 days from the entry thereof. This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

food not less scarce than vital in the present emergency, are dissatisfied with the maximum price regulation applicable to their business. Under the statute methods are provided whereby these objections could be disposed of in an orderly manner

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"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself (pp. 24–25).

The following excerpt from the hearings on the bill is also pertinent:

"Mr. GINSBURG. The bill [as originally passed by the House] further omits provisions with regard to a stay. In our bill—and I believe in the bill proposed by Senator Taft—the price remains in effect while it is being reviewed by the courts. The idea is that if the price could be stayed while it is being reviewed by the courts, there would be no possibility of price control in the interval.

"The House Bill omits the stay provision. It permits diversity of decision and review by 11 different courts. In some circuits the price could go up because the price fixed by the Administrator or the Board is no longer in effect; in other circuits, where there have not been any appeals, the price would remain fixed.

"Senator TAFT. There should be no stays. (Hearings before the Committee on Banking and Currency, Senate, 77th Cong., 1st Sess., H. R. 5990, pp. 146, 147)."

without violent dislocations—without subjecting the public to the hardships of a reduced supply of meat or excessive meat prices, and without involving the dissatisfied meat dealers in prosecutions for breaking the law. The dealers, however, have not pursued their statutory remedy and have invited criminal prosecutions by violating the price regulation.[6] Finally, they have now attempted to thwart these prosecutions by invoking a forbidden jurisdiction in the Court below to have the entire statute declared unconstitutional and to have enforcement of the statute ended by a sweeping injunction.

If the events described should establish a model for other persons subject to maximum price regulations the price control program would collapse. The provisions of the Act which provide for exclusive jurisdiction and prevent the issuance of premature stays are intended to avert this danger and at the same time afford to aggrieved persons an appropriate avenue of relief.[7]

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[6] The initial statutory 60-day period provided in section 204 (a) for filing of protests against Revised Maximum Price Regulation No. 169 (7 F. R. 10381), expired on February 14, 1943. The indictments against appellants were handed down on February 9, 1943. Appellants have not attempted to file protests on new grounds arising after the initial 60-day period, as they are entitled to do under section 204 (a) upon a proper showing that such new grounds have in fact arisen.

[7] We indicate in Point II, *infra* (pp. 65–67), some of the features of the present case which make injunctive relief particularly inappropriate.

B. THE PROVISIONS OF SECTION 204 (d) WHICH WITHDRAW JURISDICTION FROM THE COURT BELOW TO ENJOIN ENFORCEMENT OF MAXIMUM PRICE REGULATIONS ARE CONSTITUTIONAL

That the exclusive jurisdiction provisions of the Emergency Price Control Act are indispensable parts of a statute enacted under the war powers of Congress and are essential to the effective operation of wartime price control is, we submit, sufficient to establish their validity. In exercising these powers for the control of prices in wartime, the choice of measures and procedures to make that control effective is a necessary part of the Congressional authority. The war power of the Federal Government "is a power to wage war successfully." *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426; see also *Stewart* v. *Kahn,* 11 Wall. 493, 506; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 163.

More particularly, however, the statutory prohibition against injunctive relief in any court save the Emergency Court of Appeals is unquestionably a valid exercise of Congressional control over the jurisdiction of the inferior federal courts, as that prohibition comes into force in the present case. In numerous decisions, of which *Kline* v. *Burke Construction Company,* 260 U. S. 226, may be taken as typical, this Court has affirmed the proposition that the lower federal courts are dependent for their jurisdiction entirely upon acts of Congress and that there is no constitutional right that Congress shall provide ac-

cess to the federal courts in particular classes of cases. Throughout our history Congress has exercised control over the jurisdiction of the lower federal courts, frequently in relation to legislative policies of a broad nature. Congress has set up and abolished special courts, such as the old circuit courts and the Commerce Court,[8] has raised the threshold jurisdictional amount,[9] and has on occasion withdrawn jurisdiction over pending cases.[10]

In *Cary* v. *Curtis*, 3 How. 235, the Court upheld a statute prohibiting suits in assumpsit against collectors of customs, as against the contention that the statute was repugnant to the Constitution because it debarred citizens from the right to resort to the courts for redress of common law wrongs. The decision was rested on the alternative grounds of sovereign immunity and the authority of Congress under Article III of the Constitution (pp. 244–245).

The withdrawal of authority to grant injunctive relief in certain classes of cases is a familiar form of Congressional control. Section 3224 of the Revised Statutes is perhaps the most frequently invoked of these prohibitions. While the Court has

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[8] 36 Stat. 1087, 1167; 38 Stat. 219.

[9] 24 Stat. 552; 36 Stat. 1091.

[10] See, e. g., *Ex parte McCardle*, 7 Wall. 506, 515; *Smallwood* v. *Gallardo*, 275 U. S. 56.

Statutes regulating the jurisdiction of the lower federal courts are collected in 37 Harv. L. Rev. 1059, App. I.

occasionally divided on the question whether "exceptional circumstances" will take a case out of the prohibition against injunctions to restrain the collection of federal taxes, the division has turned on the meaning of the statute and not on constitutional power. Cf. *Miller* v. *Standard Nut Margarine Company*, 284 U. S. 498. Similarly, the Norris-LaGuardia Act has frequently been applied both by the lower federal courts and by this Court to prohibit injunctive relief against certain forms of labor activities. In *Lauf* v. *Shinner & Co.*, 303 U. S. 323, this Court reversed a decree granting injunctive relief where findings required by the statute had not been made, even though the findings which were made, of irreparable injury and lack of remedy at law, are traditionally deemed sufficient for equitable relief. The Court said (p. 330):

> There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States. * * *

In the present statute Congress has exercised its control more narrowly, in that it has not withdrawn injunctive power from the federal courts but has distributed that power by making it the function exclusively of the Emergency Court of Appeals. This precise form of statutory procedure is, of course, not a novelty. Since the legislation creating the Federal Trade Commission in 1914, provision for exclusive judicial review in one class of courts has been incorporated into most federal statutes deal-

ing with administrative regulation.[11] These statutes commonly provide for an exclusive mode of review without explicit withdrawal, as in the present statute, of the injunctive power from other federal courts. Nevertheless, it has been recognized that even without such explicit provision the exclusive procedure carries with it as a necessary corollary the denial of injunctive powers to other federal courts. See, e. g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. At the time of the decision in the *Myers* case the validity of the National Labor Relations Act had been determined. In a case arising under the Federal Alcohol Administration Act it was held that the same rule was to be applied even though the validity of the act had

[11] Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U. S. C. Sec. 45 (c) (d); Packers and Stockyards Act, 1921, 42 Stat. 162 (1921), 7 U. S. C. Sec. 194; Securities Act of 1933, 48 Stat. 80 (1933), 15 U. S. C. Sec. 77i; Securities Exchange Act of 1934, 48 Stat. 901 (1934), 15 U. S. C. Sec. 78y; Public Utility Holding Company Act of 1935, 49 Stat. 834 (1935), 15 U. S. C. Sec. 79x; Federal Power Act, 49 Stat. 860 (1935), 16 U. S. C. Sec. 825l; National Labor Relations Act, 49 Stat. 454 (1935), 29 U. S. C. Secs. 160 (e) (f); Bituminous Coal Act of 1937, 50 Stat. 85 (1937), 15 U. S. C. Secs. 836 (b) (c) (d); Fair Labor Standards Act of 1938, 52 Stat. 1065 (1938), 29 U. S. C. Sec. 210; Agricultural Adjustment Act of 1938, 52 Stat. 63, 64 (1938), 7 U. S. C. Secs. 1365–1367; Civil Aeronautics Act of 1938, 52 Stat. 1024 (1938), 49 U. S. C. Sec. 646 (d); Federal Alcohol Administration Act, 49 Stat. 980 (1935), 27 U. S. C. Sec. 204h. The Communications Act of 1934, 48 Stat. 1093 (1934), 47 U. S. C. Sec. 402 (b), and the Commodity Exchange Act, 49 Stat. 1496, 1498 (1936), 7 U. S. C. Secs. 6g, 9, contain the same type of statutory review procedure but do not provide in terms that the jurisdiction of the designated review court shall be "exclusive."

not been ultimately established and was being challenged. *Arrow Distilleries, Inc.* v. *Alexander,* 24 F. Supp. 880 (District of Columbia), affirmed *per curiam,* 306 U. S. 615.

The decision of the court below, holding that it was without power to entertain the suit, is in accord with the decisions in all the other cases presenting a similar question under the Act. *Hatter* v. *Henderson,* Southern District Alabama, decided July 28, 1942, OPA Service 622:1; *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kan.); *Dieffenbaugh* v. *Cook,* 47 F. Supp. 645 (N. D. Ind.).

The force of the consistent holdings discussed above, sustaining Congressional withdrawals of injunctive jurisdiction, cannot be weakened by reference to dicta concerning the doctrine of separation of powers. Appellants cite only one decision of this Court setting aside an Act of Congress on that ground: *United States* v. *Klein,* 13 Wall 128; the statute there prescribed an arbitrary rule for the judicial determination of a question of fact, and in addition it infringed the executive power of pardon.

What has been said thus far is directed to the question of jurisdiction as it is presented by the application of Section 204 (d) to the present suit, one brought in a federal district court. The withdrawal of injunctive power by the Act is, of course, broader, and extends to state courts as well, in order to preserve the exclusive authority of the Emergency Court of Appeals. Thus the

withdrawal of injunctive power is part of a coherent procedural system. In the next succeeding portions of the brief we turn to a consideration of the other features of that system, which afford administrative and judicial review to aggrieved persons and certain aspects of which are attacked by appellants.

C. THE PROVISIONS WHICH PROHIBIT STAYS AND INTERLOCUTORY INJUNCTIVE ORDERS FOR THE PURPOSE OF MAINTAINING CONTINUITY OF PRICE CONTROL PENDING COMPLETION OF STATUTORY REVIEW PROCEEDINGS ARE CONSTITUTIONAL.

Appellants, in addition to complaining of denial of access to the district courts, complain also of the accompanying provision denying stays in the statutory review forum (sections 204 (b), 204 (c)). Attack is thus made upon the provisions of the Act which insure the continuity necessary for success of the present wartime price controls.

The provisions assailed are an indispensable part of a statute which rests on the war powers of Congress. We have pointed out above (see pages 15–18, *supra*) that these provisions are essential because the principal difficulty in dealing effectively with wartime price inflation arises from its "runaway" or "spiral" character. Delayed or interrupted control is futile. The harm done to the public interest by a release of control could not be guarded against by any bond or deposit. Appellants' assertion that they will suffer loss under this statute cannot outweigh the overwhelming considerations on the side of the public. The

validity of the denial of stays in this Act rests, then, primarily upon the war powers of Congress. Further, however, it is submitted (1) that appellants cannot attack the stay provisions because they have not been injured by them; and (2) that there is no constitutional right to a stay.

1. *Appellants Have Not Been Injured by the Stay Provisions*

Appellants have not been injured by the provisions of the statute denying them access to the district courts or by those which preserve the continuity of price regulations in the statutory forum, because they have not gone into the administrative forum provided in section 203 of the Act and in the implementing regulations. By applying for administrative reconsideration appellants might have obtained complete relief in the form of a substantive order or amendment which would have been the equivalent of a stay. There would then have been no need for a judicial stay or for this action.

It is well established that persons may not challenge a statutory procedure which they have declined to pursue and whose untried incidents cannot properly form the subject of collateral inquiry or attack. *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 354–355; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 542, 544–545; *Melton* v. *Railroad Commission of Texas,* 10 F. Supp. 984,

985-986 (W. D. Tex. 1935). Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 293–294 (dissent). Before appellants can complain that they are hurt by the provisions of the statute denying them judicial stays, they are under a duty to show that they have made an effort under the statutory procedure to obtain administrative relief which might have obviated the need for such a stay.

2. *A Stay is not a Matter of Absolute Right Under the Constitution*

As this Court recently had occasion to declare in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, there is no absolute right to a stay pending judicial review of legislative or administrative enactments; the right to such a stay is never recognized where the public interest demands otherwise. The Court said, (p. 10):

> A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672–73; * * *.

The question before the Court in that case was whether Congress intended to authorize stays in a certain class of proceedings for judicial re-

view of orders of the Federal Communications Commission. The statute was construed as authorizing stays. Neither the majority nor the dissenting opinion treated the question on any level save that of Congressional intention. In the case at bar the answer is not in doubt. This Court indicated the answer when, in the *Scripps-Howard* case, it adverted to the present Act and declared that Congress "knew how to use apt words" (316 U. S. at 17) to express its command that the present wartime price controls shall remain immune against judicial stays.

The recognition in the *Scripps-Howard* case that stays are not a matter of absolute right and may be subject to Congressional control in the public interest is in accord with the well-established principle that the courts themselves do not permit stays in situations involving some object of paramount public concern. The rule traditionally followed in such cases is that the "balance of convenience" between the parties must condition the granting of a stay. Frequently granted in suits between private parties, stays even in that class of suits are not absolutely guaranteed because the right is qualified by two conditions: first, it must appear that the rights of the party to be aided will suffer heavily if relief is denied; but, second, it must also appear that the rights of the party to be enjoined will not be seriously injured in the meantime or can be protected by the posting

of financial security. That the first of these conditions is met is not enough; the second must also be met.[12]

When a suit between private parties is one involving a matter seriously affecting the public interest,[13] and, *a fortiori,* when a governmental entity

[12] In the following private cases relief was denied under this rule: *Kryptok Co.* v. *Stead Lens Co.*, 190 Fed. 767 (C. C. A. 8th, 1911); *Shubert* v. *Woodward*, 167 Fed. 47 (C. C. A. 8th, 1909); *Green* v. *Gravatt*, 19 F. Supp. 87 (W. D. Pa. 1937); *International Film Service Co.* v. *Associated Producers*, 273 Fed. 585 (S. D. N. Y. 1921); *DeKoven* v. *Lake Shore & M. S. Ry. Co.*, 216 Fed. 955 (S. D. N. Y. 1914); *Napier* v. *Westerhoff*, 138 Fed. 420 (C. C. S. D. N. Y. 1905); *Gring* v. *Chesapeake & Delaware Canal Co.*, 129 Fed. 996 (C. C. Del. 1904), *affirmed*, 159 Fed. 662 (C. C. A. 4th, 1908), certiorari denied, 212 U. U. S. 571; *Amelia Milling Co.* v. *Tennessee Coal, Iron & R. Co.*, 123 Fed. 811 (C. C. Ga. N. D. 1903); *Day* v. *Candee*, Fed Cas. 3676 (C. C. Conn. 1853). In the following private cases relief was given under the rule: *Selchow & Righter Co.* v. *Western Printing & Lithographing Co.*, 112 F. (2d) 430 (C. C. A. 7th 1940); *Phillips v. Sager*, 276 Fed. 625 (App. D. C. 1921); *Chew* v. *First Presbyterian Church of Wilmington, Del., Inc.*, 237 Fed. 219 (Del. 1916); *Colgate* v. *James T. White & Co.*, 169 Fed. 887 (C. C. S. D. N. Y. 1909); *Harriman v. Northern Securities Co.*, 132 Fed. 464 (C. C. N. J. 1904), reversed, 134 Fed. 331 (C. C. A. 3rd, 1905); affirmed, 197 U. S. 244; *Cohen* v. *Delavina*, 104 Fed. 946 (C. C. Maine 1900).

[13] *E. g. Stein* v. *Bienville Water Supply Co.*, 32 Fed. 876 (C. C. S. D. Ala. 1887), denying an injunction *pendente lite* as between private parties where the pubic water supply of a city was involved. The public interest was also a ground for denial of relief as between private parties in *Marconi Wireless Telegraph Co.* v. *Simon*, 227 Fed. 906 (S. D. N. Y. 1915). See *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282 (W. D. Tenn. 1937).

or agency is directly involved as a party in a suit, this rule achieves the status of a virtual bar against stays.[14] See *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338. If a stay is granted in such a suit against a public agency, it is strictly conditioned upon the posting of a bond or other security to protect the public interest.[15] Cf. *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 51. If no bond is required it is because the subject matter is such that the court can exercise a preservative control

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[14] E. g. *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710; *Railroad Commission of Alabama* v. *Central of Georgia Ry. Co.*, 170 Fed. 225 (C. C. A. 5th, 1909), certiorari denied, 214 U. S. 521; *Pope* v. *Blanton*, 10 F. Supp. 18 (N. D. Fla. 1935); *Dryfoos* v. *Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264; *Hannah & Hogg* v. *Clyne*, 263 Fed. 599 (N. D. Ill. 1919); *F. W. Cook Brewing Co.* v. *Garber*, 168 Fed. 942 (C. C. M. D. Ala. 1909). *See* Hughes, *Federal Practice*, Sec. 1023; Nichols, *Cyclopedia of Federal Procedure*, Sec. 3210; McKean, *The Balance of Convenience Doctrine*, 39 Dickinson L. Rev. 211 (1935).

[15] *Magruder* v. *Belle Fourche Valley Water Users' Ass'n.*, 219 Fed. 72 (C. C. A. 8th, 1914); *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 821 (C. C. A. 8th, 1911), certiorari denied, 220 U. S. 618; *Menominee & Marinette Light & Traction Co.* v. *City of Menominee*, 11 F. Supp. 989 (W. D. Mich. 1935); *Birkheiser* v. *City of Los Angeles*, 11 F. Supp. 689 (S. D. Cal. 1935); *Joplin & P. Ry. Co.* v. *Public Service Commission of Missouri*, 267 Fed. 584 (W. D. Mo. 1919); *Contra Costa Water Co.* v. *City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal. 1904); *San Joaquin & Kings River Canal & Irrigation Co.* v. *Stanislaus County*, 163 Fed. 567 (C. C. N. D. Cal. 1908); *Indianapolis Gas Co.* v. *City of Indianapolis*, 82 Fed. 245 (C. C. Ind. 1897). Cf. *United States* v. *Dominion Oil Co.*, 241 Fed. 425 (S. D. Cal. 1917). See *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440.

over it *pendente lite*.[16] But when the case is one where the public interest is substantial and connot be protected by bond or otherwise the courts are emphatic in rejecting petitions for interlocutory relief.

Thus, in *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710, the circuit court of appeals reversed an order of the lower court entering an interlocutory injunction against the Tennessee Valley Authority. The court said (p. 894):

> Without denying that some injury may be suffered if the injunction is lifted, it does not so clearly appear that it will of necessity overbalance the injury which must inevitably be suffered by the defendants and the public.
>
> * * * To appraise the injury to the defendants from the disorganization which must follow substantial or even partial cessation of activity is impossible, but that it will be great cannot be denied. So also in respect to the public interest involved. The loss, inconvenience, and discomfort of the residents of the area in failing to obtain cheap electric energy, if it be found in the end that it may lawfully be supplied to them, may likewise not be measured, but equally incontrovertible is it that it will be

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[16] Cf. *In re Arkansas Railroad Rates*, 168 Fed. 720 (C. C. E. D. Ark. 1909); *Buffalo Gas Co.* v. *City of Buffalo*, 156 Fed. 370 (C. C. W. D. N. Y. 1907).

great. In so far, also, as restraint will delay effective control of the flood waters of the Tennessee river and its tributaries, the public interest in the achievement of that objective is similarly beyond appraisal. Human experience of the catastrophic effect upon great areas of overflowing rivers is too recent and too painful to permit of any doubt either as to the existence or extent of the public interest that is threatened by the maintenance of the injunction, and against which the threat to private interests must be balanced. From such possible injury, it is clear no bond can adequately safeguard the public interest.

In *Dryfoos* v. *Edwards,* 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264, a temporary injunction against the World War Prohibition Act was refused. The court stated (p. 603):

* * * The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting* v. *Kansas City Stockyards,* (C. C.) 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not * * *.

Cf. *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 222–223. An application of the balance of convenience rule was also made under the District of Columbia World War Rent Law (the "Ball Act").[17] In *Block* v. *Hirsh*, 256 U. S. 135, rejecting the contention that a wartime rent control law allowing tenants to remain in possession at the existing rentals pending judicial review was unconstitutional, Mr. Justice Holmes, speaking for the Court, declared (pp. 157–158):

> The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law.

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[17] Section 110 of the Ball Rent Act, 41 Stat. 298 (1919), provided that rent determinations by the statutory commission should remain in full force and effect pending the final decision on appeal. This provision was applied in *Porter* v. *Gardner*, 277 Fed. 556 (App. D. C., 1922).

A similar provision is found in the wartime National Prohibition Act of 1919, Sec. 5, 41 Stat. 310. The Act provided that upon judicial review of orders of the Commissioner of Internal Revenue revoking permits to deal in liquor for non-beverage purposes, the permit should remain revoked pending judicial review. The provision was upheld in *Cyran* v. *Blair*, 16 F. (2d) 279 (N. D. Ill., 1926); *Spartan Mfg. Co.* v. *Campbell*, 40 F. (2d) 745 (E. D. N. Y. 1930); *Rondinella* v. *Campbell*, 40 F. (2d) 746 (E. D. N. Y. 1930); *Triborough Chemical Corp.* v. *Doran*, 36 F. (2d) 496 (E. D. N. Y. 1929). See *Liscio* v. *Campbell*, 34 F. (2d) 646 (C. C. A. 2nd, 1929).

These two examples of congressional denial of stays are in addition to the instance—that in the present Act—noted by the Court in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 11.

> If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

The observations of Mr. Justice Frankfurter, concurring, in *Mayo* v. *Canning Co.*, 309 U. S. 310 (1940), are applicable, *mutatis mutandis*, here. The Company had sued in the Federal district court to enjoin enforcement of a Florida statute regulating the citrus fruit industry. This Court reversed the decree granting a temporary injunction. The concurring opinion emphasized the damage done to the public interest by the granting of the interlocutory decree (pp. 319–322):

> Citrus fruit occupies a central and indeed pervasive role in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. * * * In *Nebbia* v. *New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare * * *
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> * * * * *
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> * * * [In this case] the [interlocutory] injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.
>
> I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial

> process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.

The law furnishes many examples of this preference in favor of the public interest. There are numerous situations in which there is imposed a duty to obey first and litigate afterwards. The Selective Service Act is an outstanding example.[18]

The principle, however, finds its most frequent application in cases involving property rights. Mr. Justice Brandeis summarized it in *Phillips* v. *Commissioner*, 283 U. S. 589, 595: "Property rights must yield provisionally to governmental need." The opinion added (pp. 596–597):

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary de-

[18] Administrative appeals to the appeal boards and the President are the selectees' only remedy prior to induction since no judicial review is afforded them in advance. E g., *Petition of Soberman*, 37 F. Supp. 522 (E. D. N. Y. 1941); *Shimola* v. *Local Board No. 42, for Cuyahoga County*, 40 F. Supp. 808 (N. D. Ohio 1941).

struction of property by administrative authorities without antecedent notice or hearing. Compare *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Hutchinson* v. *Valdosta*, 227 U. S. 303; *Adams* v. *Milwaukee*, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in wartime. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *United States* v. *Pfitsch*, 256 U. S. 547, 553. Compare *Miller* v. *United States*, 11 Wall. 268, 296; *International Paper Co.* v. *United States*, 282 U. S. 399; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 518; *Crozier* v. *Fried Krupp Aktiengesellschaft*, 224 U. S. 290, 306.

It is difficult to imagine a situation calling more strongly than the present one for the application of the rules limiting the right to a stay. It is plain where the "balance of convenience" lies. No case of private inconvenience or even hardship can be allowed to avail to disorganize the operation, delicate and precarious enough at best, of the wartime price control program before a full and orderly review has been had. As was stated by the three-judge district court in *Henderson* v. *Kimmel*, 47 F. Supp. 635, 644–645 (D. Kan. 1942):

> While the inhibition against the granting of the stay until a final decision by the Supreme Court deprives the courts of an historic power—a power as old as the judicial system of the nation, it is deprivation of jurisdiction essential to the successful operation of rent control for the reasons we have heretofore adverted to and is justified under the war power, to insure the safety of the nation and the perpetuation of our liberties. Moreover, a stay is not a matter of right, even if irreparable injury might otherwise result. It is an exercise of judicial discretion and the propriety of its issue ordinarily depends on the circumstances of each case. The considerations we have adverted to would warrant a court in denying a stay and in our judgment warranted the Congress in denying the power to grant the stay. Congress had the power to impose the duty to obey first and litigate afterwards.

Appellants specifically complain of the provision of the present Act which requires that judgments of the Emergency Court of Appeals setting aside a regulation shall not become effective until 30 days have passed or until final disposition of the matter by the Supreme Court (section 204 (b)). The Senate Committee in favorably reporting this provision explained its purpose (77th Cong., 1st Sess., S. Rep. No. 931, p. 24):

> This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modi-

fying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

There is nothing unfamiliar about statutory postponement of the effectiveness of judgments pending review even when the decree is one for injunction. Cf. *Federal Rules of Civil Procedure*, Rule 62, see especially subdivisions (*c*) and (*g*); 28 U. S. C., sections 350, 874. Moreover, it is not uncommon for final injunctions against a governmental entity to be stayed or postponed for very long periods, even where no appeal is in view, on the ground that the public interest so requires. Thus, in *Wisconsin* v. *Illinois*, 278 U. S. 367, while an injunction was granted against a sanitary district restraining it from diverting water from the Great Lakes for sewage disposal purposes, the decree was so framed as to allow sufficient time to the district to find some other means of disposal.

To the same effect are *Mayor and City Council of Baltimore* v. *Brack*, 3 Atl. (2d) 471 (Md., 1939); *Livezey* v. *Town of Bel Air*, 199 Atl. 838 (Md., 1938); *Board of Health of Ocean T'p* v. *White*, 110 Atl. 43 (N. J. Ct. of Errors and Appeals, 1919);

Simmons v. *Paterson*, 60 N. J. Eq. 385, 45 Atl. 995 (1900); *Bogart* v. *Walker*, 248 N. Y. Supp. 19 (1931); *Sponenburgh* v. *City of Gloversville*, 87 N. Y. Supp. 602, 96 App. Div. 157 (1904); *Sammons* v. *City of Gloversville*, 70 N. Y. Supp. 284, 34 Misc. (N. Y.) 459 (1901). See 17 Va. L. Rev. 714–715 (1931).

Cases such as *Ex Parte Young*, 209 U. S. 123, and other cases involving public utilities,[19] which may be taken as indicating that a statute denying the right to a stay is unconstitutional, are not in point. The frequent practice of granting a stay in the public utility rate cases cannot furnish a model for legislation such as the Emergency Price Control Act, where the bond or court deposit required in the rate cases would be unavailing. Moreover, the essential basis of the rule applied in the rate cases is that the compulsion upon a public utility to accept rates which may give an inadequate return and the sufficiency of which cannot be determined in advance of a protracted judicial investigation may result in a continuing "confiscation" of the utility's property, and ought not to be enforced by heavy cumulative penalties. These considerations are wholly inapplicable to the present Act.

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[19] *E. g.*, *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104; *Mountain States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290.

First, the protection which is accorded to utilities against "confiscation" of their property cannot in all instances be given to persons subject to wartime price ceilings. Utilities are few in number, usually enjoy a monopolistic position, and ordinarily must continue to render their services to the public until permission to cease is given. The primary objective in these circumstances must be a balancing of consumer and company interests which will ensure the maintenance of the essential public services furnished by utilities. The standard of fair return fills the need for some base in fixing proper rates for utility services. Under this Act, however, the considerations of public policy involved are wholly different. The primary objective of the Act is the prevention of inflation. Loss to some sellers is incidental to the accomplishment of this vital wartime purpose. The desirability of preventing such losses cannot be permitted to compromise or nullify the essential legislative objective. There is, accordingly, no place under this statute for the concept of fair return which gives rise to the problem of "confiscation" in public utility rate cases. The concept, appropriate though it may be in the public utility field, is derived by analogy from principles of eminent domain (see the concurring opinion in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 602–603, and the authorities there cited) and is wholly inappropriate to a war-

time measure for control of inflationary prices. The "just compensation" clause of the Fifth Amendment does not limit Congress in legislating for the general interest to accomplish a general object of national policy under a regulatory statute. Property rights are held subject to proper legislative regulation and any resulting loss is merely consequential or incidental injury. *Omnia Commercial Co., Inc.* v. *United States*, 261 U. S. 502; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Block* v. *Hirsh*, 256 U. S. 135; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Second, it would be incompatible with the functioning of the price control law to follow the practice of granting stays as in public utilities cases during the necessarily protracted judicial hearings required for determination of the reasonableness of fixed rates. Speed is frequently the controlling consideration in the issuance of a price regulation. Protracted formal hearings, whether at the administrative or judicial stage, would postpone the effectiveness of regulations until a threatened price or rent increase had already materialized and had already worked its destruction in the familiar pattern of the inflationary spiral. It is noteworthy that, during the consideration of the various price control bills, Congress, in addition to its recognition that judicial stays must be prevented (see pp. 20–22, *supra*), squarely rejected

the proposition that formal administrative hearings be required before the issuance of price regulations.[20] The legislative history indicates recognition of the fact that, in a war economy, effective price control cannot wait upon formal hearings.[21] Immediate action often becomes necessary because of sudden changes, wrought by governmental decree or fortunes of war, in conditions of supply or demand. Too often prolonged consideration of contemplated action would encourage speculative activities and render eventual control all the more difficult. Congress recognized that the plan established for the issuance and review of price regulations must not be too cumbersome to meet emergency situations.

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[20] The provisions of the bill reported by the House Banking and Currency Committee were virtually identical in this respect with the provisions of the Act. See H. Rept. No. 1409, 77th Cong., 1st Sess. (1941) 10–12; H. R. 5990, 77th Cong. 1st Sess. (1941). See also Sen. Comm. Print, Hearings before Sen. Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess. (1941) 72–105. The first bill passed by the House authorized the issuance of price regulations by the Administrator without prior hearing, followed by opportunity for full hearing before an administrative Board of Review while the regulations remained in effect. H. R. 5990 (in the Senate), 77th Cong., 1st Sess. (1941). The Senate rejected this. A proposal by Senator Taft to require hearings prior to the issuance of price regulations but authorizing temporary regulations without prior hearings to remain in effect for not more than sixty days was never brought to a vote. Amendment to H. R. 5990, Intended To Be Proposed by Mr. Taft, 88 Cong. Rec. (Senate), Jan. 5, 1942, at 5.

[21] See, e. g., H. Rep. No. 1409, p. 9: "The procedure governing the preparation and issuance of substantive regula-

Third, the principle of decision applied in some public utility cases, and in other types of cases, to the effect that a stay is required as a protection against excessive or cumulative penalties, is not applicable to the present Act. The rule that penalties *pendente lite* are unconstitutional and ought to be stayed if they are so excessive as to deter resort to the courts was originally developed in cases where the only means of obtaining judicial review of a statute or an administrative order was by committing a violation and awaiting prosecution. *Oklahoma Gin Co.* v. *Oklahoma,* 252 U. S. 339; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *Ex parte Young,* 209 U. S. 123; *Federal Trade Commission* v. *Miller's Nat. Federation,* 23 F. (2d) 968 (App. D. C. 1927); *Allen* v. *Omaha Live Stock Commission Co.,* 275 Fed. 1 (C. C. A. 8th, 1921). This condition does not obtain under the present Act, of course. Nor is the Act open to the objection that penalties are laid on the very exercise of the right of review, as in *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

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tions and orders prescribing ceilings or regulating practices has necessarily been adapted to the nature of the powers granted, which involved a broad delegation of legislative power, to the fact that such regulations will apply to large numbers of persons, and to practical considerations such as the necessity for immediate action to check rapidly rising prices and the importance of avoiding speculative disturbances of the market pending the determination of a price ceiling. * * *"

It is submitted, therefore, that the stay provisions of this Act are a valid exercise of the war powers of Congress, and are fully supported by established principles of public law. These provisions are the most essential feature of the entire statutory plan of review and enforcement. They are indispensable for effective price control. Appellants' constitutional rights are in no way abridged by these provisions.[22]

D. THE PROVISION WHICH BARS CONSIDERATION OF THE VALIDITY OF MAXIMUM PRICE REGULATIONS IN SUITS TO ENFORCE THE ACT AND GRANTS EXCLUSIVE AUTHORITY IN THAT REGARD TO THE EMERGENCY COURT OF APPEALS IS CONSTITUTIONAL

Appellants complain of the withdrawal of injunctive jurisdiction from the court below on the further ground that, in accordance with the provisions of section 204 (d) of the Act, the validity of Maximum Price Regulation No. 169 may not be considered by the court in criminal enforcement proceedings and hence cannot form a ground of defense to the prosecutions.

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[22] The case of *Porter* v. *Investors Syndicate*, 286 U. S. 461, affirmed on rehearing, 287 U. S. 346, relied on by appellants, contains a dictum to the effect that a statutory denial of a stay during review of an order revoking licenses under a state Blue Sky law would abridge constitutional rights. It is submitted that the considerations set forth in the preceding pages make the language of the *Porter* case inapplicable to this wartime statute. It may also be observed that in license suspension proceedings under this Act the Administrator is not empowered to suspend, but must apply for a judicial order of suspension which may, in turn, be stayed. (Section 205 (f).)

Any objections which appellants may wish to make against this provision of the Act, or against other provisions of the Act, are fully within the power of the district court to decide in the criminal proceedings. It is thus questionable whether there is need to pass upon this objection in the present suit. In any event, the provision in question does not deprive appellants of constitutional rights.

We have previously shown (pp. 18–20, *supra*) that in connection with the plan for exclusive review of price regulations in an emergency judicial forum[22] such a restriction had to be imposed in proceedings to enforce the regulations as a necessary corollary of the grant of exclusive jurisdiction to the Emergency Court of Appeals and this Court. This provision of section 204 (d), like the bar against injunctions in the district courts, is designed to ensure that the exclusive purview reserved to the statutory forum will not be infringed by other courts. The provision constitutes a recognition by Congress of the need for uniform application and proper enforcement of wartime price controls. The provision fulfills this need by ensuring well advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in de-

[22] As heretofore pointed out (see p. 14, *supra*), appellants are incorrect in their contention that the Emergency Court of Appeals may pass only upon regulations and not upon the statute itself.

termining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.

Thus, the statutory ban against inquiry respecting the validity of regulations in enforcement suits is an integral part of a statutory plan adopted in furtherance of vital wartime objectives. This provision of the Act rests, therefore, like the other features of the exclusive review plan attacked by appellants, primarily on the war powers of Congress. This alone, we submit, is sufficient to establish the validity of the provision (see p. 24, *supra*, and cases there cited).

Its validity is fortified by established principles of administrative law. Even in the absence of section 204 (d) appellants would not have the right to challenge the regulation in the criminal proceedings. Appellants would be prevented from challenging the regulation in those suits as a normal consequence of their failure to exhaust their administrative remedies. In specifically compelling the same result, therefore, the Act has not deprived appellants of any rights they might otherwise have had. Any objection against the validity of the regulation is available if raised

in the appropriate manner and at the proper time.[24] The essential purpose of the rule requiring exhaustion of administrative remedies before resort to the courts—which Mr. Justice Brandeis described in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 as a "rule of judicial administration"—is to allow the administrative body which promulgated the regulation an opportunity to consider objections to it and if necessary modify it upon full consideration of the relevant facts, accommodating the relief to the needs of the particular case. That rule, together with the rule preventing collateral attack upon administrative determinations, makes an administrative enactment unassailable in proceedings instituted to enforce it.

Thus, in *Bradley* v. *City of Richmond*, 227 U. S. 477, a defendant in a criminal prosecution for violation of an ordinance requiring private bankers to obtain licenses was held barred from challenging his administrative classification because of his failure to appear before the classifying agency. No statute required the Court to refrain from considering the validity of the administrative action; yet the Court ruled that, because the procedure established by the statute which might have afforded relief was not pursued, invalidity even on

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[24] As previously mentioned, appellants have not pursued any of the administrative remedies available to them. See p. 23, n. 6, *supra*.

constitutional grounds could not be urged as a defense in a criminal proceeding. The Court said (p. 485):

> The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under these circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council.
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> * * *

In *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y. 1908) the court upheld the constitutionality of the Elkins Act (Act of Feb. 19, 1903, c. 708, sec. 1, 32 Stat. 847, 49 U. S. C. 41), which was construed to deprive a shipper of the right to contest the reasonableness of the carrier's filed rate in defending against a criminal prosecu-

tion for receiving rebates.[25] The same statute was involved in *Lehigh Valley R. Co.* v. *United States*, 188 Fed. 879 (C. C. A. 3d, 1911), a criminal prosecution for improperly cancelling demurrage charges. The defense that the demurrage rates set up by the Interstate Commerce Commission were discriminatory was held unavailable in a criminal prosecution, since the validity of the rate could be questioned only in an administrative proceeding before the Commission.

Cases under the Selective Service Act consistently hold that in a prosecution for failure to report for induction the defendant may not litigate the alleged arbitrariness or invalidity of his

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[25] The court said (p. 540):

"* * * That Congress had power under the commerce clause of the Constitution to regulate commerce is conceded, and its purpose in enacting the statute forbidding unjust discrimination and preference to the end that all shippers shall secure uniform treatment is beyond question. How this object and purpose of Congress can be effectuated if a shipper receiving rebate, concession, or discrimination is permitted to question or litigate the legality of the rate as to its reasonableness or unreasonableness in a criminal prosecution charging him with having received a concession is difficult to understand. Indeed such a construction of the act would nullify its general scope, and render its strict enforcement wholly impracticable, for juries and judges in different jurisdictions would not be likely to reach a conclusion upon the subject of just or unjust tariff charges which would secure uniformity of rates. It is therefore clear that there can be no departure or deviation from the established rates except in the manner provided by the act, and such rate must be regarded as binding upon the shipper * * *."

classification as determined by the Local Board. *Johnson* v. *United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *United States* v. *Grieme*, 128 F. (2d) 811 (C. C. A. 3d, 1942); *Fletcher* v. *United States*, 129 F. (2d) 262 (C. C. A. 5th, 1942); *United States* v. *Bowles*, 131 F. (2d) 818 (C. C. A. 3d, 1942), certiorari granted March 1, 1943, No. 589, this term; *United States* v. *Kauten*, 133 F. (2d) 703 (C. C. A. 2d, 1943).

The rule thus forbidding collateral attack on administrative orders in criminal proceedings has, of course, likewise been applied in other types of enforcement suits. The principle requiring exhaustion of administrative remedies has equally compelling force in both civil and criminal suits. Only the method outlined in the statute for testing the validity of an administrative order may be used. Unless and until the order has been set aside in direct proceedings to challenge it, it must be observed and compliance will be enforced. This result is reached although no statute expressly commands it, and a statute which does command it is undoubtedly constitutional. *American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *United States* v. *Piuma*, 40 F. Supp. 119 (S. D. Cal. 1941), affirmed, 126 F. (2d) 601 (C. C. A. 9th, 1942); *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651 (N. D. 1941). Cf. *Inghram* v. *Union Stock Yards Co.*, 64 F. (2d) 390 (C. C. A. 8th,

1933); *Forbes* v. *United States,* 125 F. (2d) 404 (C. C. A. 9th, 1942); *United States* v. *R. L. Dixon and Bro.,* 36 F. Supp. 147 (N. D. Tex. 1940); *United States* v. *Hawthorne,* 31 F. Supp. 827 (N. D. Tex. 1940), affirmed on other grounds, 115 F. (2d) 805 (C. C. A. 5th, 1940); *Harris* v. *Central Nebraska Public Power & Irr. Dist.,* 29 F. Supp. 425 (Neb. 1938).[28]

This Court has specifically declared that where rates have been established by an administrative agency, they may be challenged only in the manner prescribed by statute and that other courts may not prevent the agency from prosecuting violators. *United States* v. *Corrick,* 298 U. S. 435. In that case operators of market agencies sought to file higher rates than those prescribed by the Secretary of Agriculture for market services under the Packers and Stockyards Act of 1921, 7 U. S. C., secs. 181–229, and to restrain the Secretary from prosecuting them for charging the

[28] To the same effect are numerous State court decisions. *Town of Pittsfield* v. *Town of Exeter,* 69 N. H. 336, 41 Atl. 82 (1898); *Town of Rockingham* v. *Hood ex rel. Bank of Pee Dee,* 204 N. C. 618, 169 S. E. 191 (1933); *Fitt* v. *Central Illinois Public Service Co.,* 273 Ill. 617, 113 N. E. 155 (1916); *Friedman Mfg. Co.* v. *Industrial Commission,* 284 Ill. 554, 120 N. E. 460 (1918); *St. Louis Pressed Steel Co.* v. *Schorr,* 303 Ill. 476, 135 N. E. 766 (1922); *People ex rel. Brittain* v. *Outwater,* 360 Ill., 621, 196 N. E. 835 (1935); *People ex rel. McDonough* v. *Beemsterboer,* 356 Ill. 432, 190 N. E. 920 (1934), certiorari denied, 293 U. S. 575 (1934), rehearing denied, 293 U. S. 630 (1934).

higher rates. Dismissing the bill, this Court said (p. 440):

> The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secretary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

It is recognized in the foregoing cases that, where the statutory review procedure has not been pursued, a defense based upon the alleged invalidity of administrative action is as inadmissible as the institution of a suit to enjoin enforcement.

Appellants in choosing to disregard the available statutory methods of review and to subject themselves to criminal prosecution by violating the regulation have made that choice knowing in advance that they would not be permitted to challenge the violated regulation in the criminal suits. Congress has accorded to appellants ready access to a proper forum in which all objections to a regulation may be presented and fully considered. Their right to challenge an allegedly invalid regulation has not been abridged. The only restrictions placed on their rights in

this respect are (1) the customary requirement, enforced by the courts themselves even in the absence of statute, that objections to any administrative order first be brought to the attention of the administrative agency; (2) the requirement, traditionally observed under statutes of this type, that where a statutory judicial forum is provided and designated as exclusive, objections to an administrative order shall be presented in such forum; and (3) the indispensable wartime enforcement of obedience to price controls pending completion of review proceedings (see pp. 29–48, *supra*).

There is no merit in appellants' contention that the Act violates their right under the Sixth Amendment to a jury trial in the district wherein the crime has been committed. Venue of the pending criminal suits is laid in the district where the crimes charged were committed. Appellants have cited no authority, and we know of none, setting up a requirement that the test of the constitutionality of an administrative order be within the district where the crime of its violation is prosecuted. The constitutional guarantee does not necessitate trial by a judge from the district, *Lamar* v. *United States*, 241 U. S. 103, and the issue of the validity of the regulation need not be settled by jury trial. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 158. This Act does not trench upon

any right guaranteed to Appellants by the Sixth Amendment.[22]

Finally, appellants' attempt to impeach the validity of section 204 (d) by attacking the validity of the substantive provisions of the Act is wholly unsound. The contention in effect means that Congress could never establish exclusive methods for judicial determination of constitutional questions under regulatory statutes. See *Kittrell* v. *Hatter*, 10 So. (2d) 827, 832 (Ala. 1942). In *Arrow Distilleries, Inc.* v. *Alexander*, 24 F. Supp. 880 (District of Columbia, 1938), affirmed per curiam, 306 U. S. 615, the authority of Congress to establish such a procedure was upheld with refusal by the Court to consider the substantive constitutionality of the statute. In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, this Court gave effect to a statutory exclusive review provision and denied the right to a district court injunction without considering petitioner's claim that its business was wholly in intrastate commerce and hence not subject to the statute. The validity of the procedural provisions is a distinct threshold question.

[22] It may be observed that if the objection is addressed to the need to come to Washington to appear before the Emergency Court of Appeals, the rules of that Court specifically provide that it may sit anywhere. Rule 4 (a), Rules of the United States Emergency Court of Appeals.

II

APART FROM THE WITHDRAWAL OF JURISDICTION BY SECTION 204 (D) THE BILL OF COMPLAINT DID NOT PRESENT A CASE WITHIN THE EQUITY JURISDICTION OF THE COURT

In Point I we have discussed the validity of the statutory withdrawal of jurisdiction in the court below to restrain criminal enforcement proceedings. Since this was the ground of decision in the court below, and since it rests on the explicit terms of the statute itself, it has seemed proper to place our discussion primarily on this ground. We submit, however, that even apart from the express withdrawal of jurisdiction the bill did not present a case within the equity jurisdiction of the court. In this aspect, the express withdrawal of jurisdiction may be regarded as a legislative codification of what would in any event be sound equity practice. We shall discuss the case from this point of view in relation to injunctive relief against both the pending criminal prosecution and threatened future prosecutions.

The bill seeks to put in issue the validity of the substantive provisions of the Price Control Act (paragraph 36). It is clear that this issue is not properly presented as a basis of relief against the pending criminal prosecution, since the validity of the Act may be challenged in the criminal case itself. Section 204 (d) of the Act

permits such a defense, as the court below said. See p. 14, n. 3, *supra*. Indeed, in a number of cases the defense of invalidity of the Act has been passed on by district courts and with one exception the decisions have sustained its validity.[28]

A further ground of attack is that the limitation of the issues in a district court proceeding is invalid. It is true that under Section 204 (d) an attack on the validity of the regulations, as distinguished from the validity of the statute, can be made only in the Emergency Court of Appeals. But to the extent that this division of functions raises a constitutional issue it can be determined in the criminal case, since the attack in this respect is on Section 204 (d) of the Act itself. In fact, such attacks have been considered in criminal cases, and it may be noted in passing that the validity of the division of functions has there

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[28] See *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan.); *Henderson* v. *Detweiler*, OPA Service 622:28 (D. Neb., Oct. 27, 1942); *Brown* v. *Wick*, OPA Service 622:54 (E. D. Mich., Feb. 19, 1943); *United States* v. *Charney*, OPA Service 620:66 (D. Mass., Dec. 17, 1942); *United States* v. *C. Thomas Stores, Inc.*, OPA Service 620:69 (D. Minn., Feb. 26, 1942); *United States* v. *Slobodkin*, OPA Service 620:73 (D. Mass., March 2, 1943); *United States* v. *Hark & Yaffee*, OPA Service 620:86 (D. Mass., March 5, 1943); *United States* v. *Sosnowitz & Lostein*, OPA Service 620:105 (D. Conn., March 25, 1943); *United States* v. *Friedman*, OPA Service 620:103 (D. Conn., March 25, 1943); *Helena Rubinstein* v. *Charline's Cut Rate*, 28 A. (2d) 113 (N. J. Eq., Sept. 11, 1942); *United States* v. *Ehrlich*, S. D. Fla., Apr. 13, 1943. *Contra: Roach* v. *Johnson*, N. D. Ind., pending on appeal, No. 840, present Term.

been sustained. *United States* v. *C. Thomas Stores, Inc.*, D. Minn., Feb. 26, 1943, OPA Service 620: 69; *United States* v. *Slobodkin*, D. Mass., March 2, 1943, OPA Service 620: 73; *United States* v. *Friedman*, D. Conn., March 25, 1943, OPA Service 620: 103; *United States* v. *Sosnowitz*, D. Conn., March 25, 1943, OPA Service 620: 105. Cf. *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan.) (civil enforcement).

So far as the bill seeks to enjoin the pending criminal action, therefore, there is no reason to depart from the familiar principle that equity will not restrain a pending criminal prosecuton. *In re Sawyer*, 124 U. S. 200; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49. As was said by Mr. Justice Hughes in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620–621:

> A court of equity, said this court in *In re Sawyer*, 124 U. S. 200, 210, "has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors. .. . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative department of the government." *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531; 2 Story's Eq. Jur., § 893.

Those cases in which injunctions were granted to restrain future prosecutions were thus distinguished (223 U. S. at 621):

> But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 161, 162; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

We turn to a consideration of the bill as it is aimed at the restraint of future prosecutions. The bill and jurisdictional statement allege the invalidity of the substantive provisions of the Act, and appear to deduce therefrom a conclusion of invalidity of the procedural provisions. But, as we have pointed out above (p. 58), this is to start

at the wrong end. While the complainants must show the probable invalidity of the substantive provisions of the statute to justify injunctive relief, that is an additional requisite; the basic showing must be that the procedure prescribed by the statute is invalid and would cause irreparable damage. *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

The bill alleges the threat of multiple penalties. It may be doubted whether the allegations are sufficient to bring it within the cases permitting injunctive relief against imminent threat of prosecutions with multiple and oppressive penalties. See *Watson* v. *Buck,* 313 U. S. 387, 400.

The defect in the bill, however, is much more fundamental than a mere defect of pleading. The bill proceeds on an erroneous assumption regarding the basis for equitable relief against the threat of multiple criminal penalties. Such penalties are not invalid *per se.* The legislature is free to impose penalties substantial enough to induce compliance with the law. The cases which have enjoined such penalties have rested on a very different ground: That there was no way of challenging the statute save by violating it and awaiting prosecution; and where the penalties were so oppressive as to make violations prohibitory all effective avenues of challenging the statute were blocked. The principle was explained in *Wadley*

Southern Railway v. *Georgia*, 235 U. S. 651, 662, discussing the cases which granted injunctions:

> These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. * * *

Under the Price Control Act the appellants can secure review of the statute and regulations in protest procedure and in the Emergency Court of Appeals. They are thus not placed in the dilemma which has characterized those parties who have secured injunctive relief against the imposition of criminal penalties. If it is argued that the procedure available is not adequate, the answer is that the argument can be made in other forums without the necessity for the extraordinary remedy of injunction. It is true that the statute prohibits any court, including the Emergency Court of Appeals, from issuing a stay to restrain the enforcement of regulations pending review in the Supreme Court. But whether the denial of a stay could validly be imposed on the appellants is a question which need not be considered in this proceeding. Recourse to the orderly protest procedure might have brought adequate relief. Any facts which would require a

stay could most appropriately be developed through the protest procedure which furnishes the record in the Emergency Court of Appeals. Moreover, there is no constitutional right to a stay. See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10. And, as we have undertaken to show (pp. 31–48, *supra*), Congress was entitled to generalize concerning those factors of public interest which are normally given great weight in granting or withholding stays or interlocutory injunctive relief.

It is important, in considering the relative appropriateness of injunctive proceedings and the protest procedure as a basis on which to judge appellants' claims, to examine more precisely the nature of their attack. The bill does not base the allegation of irreparable damage on the inadequacy of the maximum selling price the violations of which form the basis of the prosecutions. The attack is rather on the existence of maximum price ceilings at the stage in the economic process occupied by the packers, from whom the appellants purchase. It is therefore pertinent to inquire how an injunction against prosecution for sales in excess of the wholesalers' ceiling prices will help the appellants, unless they are given freedom also to buy in violation of the packers' ceiling prices and unless the packers would thereby be led to sell for higher prices and so increase their purchases from livestock producers. It is

this chain of events which must ensue, on the theory of the bill, if appellants are to have effective relief. But the packers are not parties in the present suit. Some, in fact, filed protests with the Administrator which have been acted upon. See *In the matter of Kaufman Beef Company, et al.*, Docket No. 1169–2–P, March 29, 1943. The packers may be in a position to force livestock prices down by exerting their dominant purchasing power. And other factors are doubtless operating to cause the shortages of which appellants complain.[29] Furthermore, retailers are not parties to the suit; and appellants' theory of relief presupposes that retailers would pay higher prices despite the ceilings in force on retail sales.

What the appellants are seeking is a revision of the judgment of the administrative agency which

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[29] In the *Kaufman* opinion, *supra*, the Administrator found that the meat packing industry has a dominant influence on the prices of beef cattle. He also concluded that—

"Removal of inequalities in maximum prices has restored normal competitive relationships among purchasers in the live cattle markets. It is anticipated that specific retail prices and consumer rationing already programmed will lessen the strain on a 'short' market. Finally, vigorous enforcement of maximum prices at all levels will eliminate pressures caused by 'black market' activities. Altogether, exercise of the Administrator's authority and the cooperation of other government agencies in carrying out the program of control of beef prices is aimed at protecting producers, processors, distributors and consumers alike."

is charged with enforcing price control fairly among the several interested groups—producers, packers, wholesalers, retailers and consumers. We do not deny that appellants are entitled to have the administrative judgment reconsidered. We do insist that they have not chosen the proper forum or sought the proper form of relief. If any question ever called for the pursuit of administrative remedies this is such a question. It calls for uniform determination, not the varying judgments of district courts throughout the country. It calls for the orderly preparation of a record in proceedings to which the Administrator is a party. It calls for delicate and resourceful adjustments as may be needed, not for a sweeping injunction releasing controls as they are applied to transactions and persons not even the subject of the criminal prosecutions.[30]

[30] The impropriety of injunctive relief is accentuated by the fact that, as the bill of complaint observes (par. —), many of the indictments contain counts for the keeping of false records. These offenses are presumably separable (cf. *Kay v. United States*, 303 U. S. 1), particularly in view of the independent importance of accurate information concerning a vital part of our national economy in wartime. Cf. *Electric Bond & Share Co., v. Securities and Exchange Commission*, 303 U. S. 419.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

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MAY 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 934.—October Term, 1942.

Clem Lockerty, Anthony Caruso, Edward A. Carroll, et al., Appellants,
vs.
Charles M. Phillips, United States Attorney for the District of New Jersey.

Appeal from the District Court of the United States for the District of New Jersey.

[May 10, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for our decision is whether the jurisdiction of the district court below to enjoin the enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942, 56 Stat. 23, was validly withdrawn by § 204(d) of the Act. Appellants brought this suit in the district court for the District of New Jersey for an injunction restraining appellee, the United States Attorney for that district, from the prosecution of pending and prospective criminal proceedings against appellants for violation of §§ 4(a) and 205(b) of the Act, and of Maximum Price Regulation No. 169. In view of the provisions of § 204(d) of the Act, the district court of three judges, 28 U. S. C. § 380a, dismissed the suit for want of jurisdiction to entertain it.

The amended bill of complaint alleges that appellants are established merchants owning valuable wholesale meat businesses, in the course of which they purchase meat from packers and sell it at wholesale to retail dealers; that Maximum Price Regulation No. 169, promulgated by the Price Administrator under the purported authority of § 2(a) of the Act, as originally issued and as revised, fixed maximum wholesale prices for specified cuts of beef; that in fixing such prices the Administrator had failed to give due consideration to the various factors affecting the cost of production and distribution of meat in the industry as a whole; that the Administrator had failed to fix or regulate the price of livestock; that the conditions in the industry — including the

quantity of meat available to packers for distribution to wholesalers, the packers' expectation of profit, and the effect of these conditions upon the prices of meat sold by packers to wholesalers —are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the prices fixed by Regulation No. 169; that enforcement of the Regulation will preclude appellants' continuance in business as meat wholesalers; that the Act as thus applied to appellants is a denial of due process in violation of the Fifth Amendment of the Constitution, and involves an unconstitutional delegation of legislative power to the Administrator; that appellee threatens to prosecute appellants for each sale of meat at a price greater than that fixed by the Regulation, and to subject them to the fine and imprisonment prescribed by §§ 4 and 205(b) of the Act for violations of the Act or of price regulations prescribed by the Administrator under the Act; and that such enforcement by repeated prosecutions of appellants will irreparably injure them in their business and property.

Section 203(a) sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may within sixty days "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections". He may also protest later on grounds arising after the expiration of the original sixty days. The subsection directs that within a specified time "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

By § 204(a), "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." Subsection (b) provides that no regulation, order, or price schedule, shall be enjoined "unless the complainant establishes to the satisfaction of the court

that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious". Under subsections (b) and (d), decisions of the Emergency Court may, by writ of certiorari, be brought for review to the Supreme Court, which is required to advance the cause on its docket and to expedite the disposition of it.

Although by following the procedure prescribed by these provisions of the Act appellants could have raised and obtained review of the questions presented by their bill of complaint, they did not protest the price regulation which they challenge and they took no proceedings for review of it by the Emergency Court. Appellants are thus seeking the aid of the district court to restrain the enforcement of an administrative order without pursuing the administrative remedy provided by the statute (cf. *Illinois Commerce Commission* v. *Thomson*, No. 178, decided April 12, 1943, p. 9), and without recourse to the judicial review by the Emergency Court of Appeals and by this Court which the statute affords.

Moreover the statute vests jurisdiction to grant equitable relief exclusively in the Emergency Court and in this Court. Section 204(d) declares: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any par-

ticular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234, and cases cited; *McIntire* v. *Wood*, 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good". *Cary* v. *Curtis*, 3 How. 236, 245; *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330; *Hallowell* v. *Commons*, 239 U. S. 506, 509; *Smallwood* v. *Gallardo*, 275 U. S. 56; *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118, 129. See also *United States* v. *Hudson and Goodwin*, 7 Cranch 32, 33; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Stevenson* v. *Fain*, 195 U. S. 165, 167; *Kentucky* v. *Powers*, 201 U. S. 1, 24; *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.

Appellants argue that the command of § 204(d) that "no court, Federal, State, or Territorial, shall have jurisdiction or power to . . . restrain, enjoin, or set aside . . . any provision of this Act" extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved by statute or regulation, their day in court to challenge its va-

stitutionality. But the statute expressly excepts from this command those remedies afforded by § 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is "not in accordance with law, or is arbitrary or capricious". A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. The present Act has at least saved to the Emergency Court, and, upon review of its decisions, to this Court, authority to determine whether any regulation, order, or price schedule promulgated under the Act is "not in accordance with law, or is arbitrary or capricious". We think it plain that orders and regulations involving an unconstitutional application of the statute are "not in accordance with law" within the meaning of this clause, and that the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.

Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204(c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For in any event, the separability clause of § 303 of the Act would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no unconstitutional infirmity.

Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

Affirmed.